TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. 231.

THOMAS D. WARREN, PLAINTIFF IN ERROR,

vs.

FLORA E. VAN BRUNT, (WIDOW OF GEORGE M. VAN BRUNT, DECEASED,) HENRIETTA E. FOSTER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED NOVEMBER 2, 1872.

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1 SUPREME COURT OF THE STATE OF MINNESOTA.

THOMAS D. WARREN
vs.
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased, Henrietta E. Foster, (formerly Van Brunt,) and Anson T. Foster, her husband; Mary E. Van Brunt, by Flora E. Van Brunt, her guardian ad litem—heirs of the said George M. Van Brunt; John A. Willard, James R. Brink, and William S. Sargent, impleaded with John C. Wise, Isaac Marks, James McMurtrie, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John Farrington, William J. Duly, Christiana Faatz, John H. Ray, and Asa White.

To the honorable C. G. Ripley, chief justice of said court:

The petition of Thomas D. Warren states that in the above-entitled action there was drawn in question in this court the construction of a statute of the United States, and that the final decision and judgment of this court was against the title, right, privilege and exemption
2 specially set up and claimed by your petitioner under said statute.

Wherefore your petitioner prays that your honor will examine the record of this court in that behalf, and allow to your petitioner a writ of error in order that the said judgment and record may be brought before the Supreme Court of the United States.

M. S. WILKINSON,
W. J. SEVERANCE,
C. K. DAVIS,
Att'ys for Thomas D. Warren.

The writ of error hereinbefore prayed is hereby allowed.

Done at the January, 1872, term of the supreme court of the State of Minnesota, and on January 6, 1872.

C. G. RIPLEY,
Chief Justice of the State of Minnesota.

Filed January 6th, 1872.

SHERWOOD HOUGH, *Clerk.*

3 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said the supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between Thomas D. Warren and Flora E. Van Brunt, widow of George M. Van Brunt, deceased; Henrietta E. Foster (formerly Van Brunt) and Anson T. Foster, her husband; Mary E. Van

Brunt, by Flora E. Van Brunt, her guardian ad litem—heirs of the said George M. Van Brunt; John A. Willard, James R. Brink, and William S. Sargeant, impleaded with John C. Wise, Isaac Marks, James McMurtrie, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John Farrington, William J. Duly, Christiana Faatz, John H. Ray, and Asa White; wherein was drawn in question the construction of a statute of the United
4 States, and the decision was against the title, right, privilege, and exemption specially set up and claimed under such statute, a manifest error hath happened, to the great damage of the said Thomas D. Warren, as by his complaint appears:

We being willing that the error, if any hath been, should be duly corrected and fully and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under you seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there *and there* held, that, the record of proceedings aforesaid being inspected, the said Supreme Court may cause to be done therein to correct that error what of right, according to the laws and customs of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the
5 said Supreme Court of the United States, the sixth day of January, in the year of our Lord one thousand eight hundred and seventy-two.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States for the District of Minnesota.

STATE OF MINNESOTA,
Supreme Court, ss:

To the honorable the Chief Justice and associate justices of the Supreme Court of the United States:

Answer of the justices of the supreme court of the State of Minnesota, as commanded in the within writ.

Dated at St. Paul, Minnesota, this 4th day of March, A. D. 1872.

[SEAL.] SHERWOOD HOUGH,
Clerk Sup. Court Minnesota.

(Indorsed:) State of Minnesota. Supreme court. Thomas D. Warren vs. Fenton E. Van Brunt et al., impleaded, &c. Writ of Error from U. S. Supreme Court. Re-issued & filed this 6th day of January, A. D. 1872. Sherwood Hough, clerk, sup. c't.

6 UNITED STATES OF AMERICA, *ss:*

To Flora E. Van Brunt, widow of George M. Van Brunt, deceased; Henrietta E. Foster (formerly Van Brunt) and Anson T. Foster, her husband; Mary E. Van Brunt, by Flora E. Van Brunt, her guardian ad litem—heir of the said George M. Van Brunt; John A. Willard, James R. Brink, and William S. Sargent, impleaded with John C. Wise, Isaac Marks, James McMurtrie, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, George Becker,

Freeman O. Webster, John Farrington, William J. Duley, Christiana Faatz, John F. Ray, and Asa White.

You and each of you are hereby cited and admonished to be and appear at Supreme Court of the United States, to be holden at Washington on the first Monday of December, 1872, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein Thomas D. Warren is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment to
7 said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. C. G. Ripley, chief justice of the supreme court of Minnesota, this 6th day of January, 1872.

C. G. RIPLEY,
Chief Justice of the Supreme Court of the State of Minnesota.

(Endorsed :) We hereby admit due service of the within citation this 8th day of January, 1872.

FRANKLIN H. WAITE.
WILLARD & BARNEY.

Supreme Court of the United States.

THOMAS D. WARREN
vs.
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Foster (formerly Van Brunt) and Anson T. Foster, her husband; Mary E. Van Brunt, by Flora E. Van Brunt, her guardian ad litem—heirs of the said George M. Van Brunt; John A. Willard, James R. Brink, and William
8 S. Sargent, impleaded with John C. Wise, Isaac Marks, James McMurtrie, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John Farrington, William J. Duley, Christiana Faatz, John H. Ray, and Asa White.

Know all men by these presents that we, Thomas D. Warren, and George Maxfield, & Henry Foster, all of the county of Blue Earth, in the State of Minnesota, are held and firmly bound unto Flora E. Van Brunt, Henrietta E. Foster, Anson T. Foster, Mary E. Van Brunt, John A. Willard, James R. Brink, and William S. Sargent, impleaded as stated in the above title to this action, in the sum of one thousand dollars, to be paid to the said obligees and their and each of their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this twenty-ninth day of December, A. D. 1871.

Whereas the above-named Thomas D. Warren has prosecuted
9 a writ of error to the Supreme Court of the United States to re-

verse the judgment and decree rendered in the above-entitled action by the supreme court of the State of Minnesota:

Now, therefore, the condition of this obligation is such, that if the above-named Thomas D. Warren shall prosecute his said writ of error to effect, and answer all costs if he shall fail to made good his plea, then this obligation *then* to be void; otherwise to remain in full force and virtue.

T. D. WARREN. [SEAL.]
GEORGE MAXFIELD. [SEAL.]
HENRY FOSTER. [SEAL.]

Executed in our presence—
W. C. DURKEE.
O. C. PITCHER.

STATE OF MINNESOTA,
County of Blue Earth:

On this 29th day of December, A. D. 1871, personally appeared before me Thomas D. Warren, and George Maxfield, and Henry Foster, to me known to be the same person' who executed the foregoing bond, and severally acknowledged that they executed the same freely and voluntarily for the uses and purposes therein expressed.

[SEAL OF DIST. COURT.] WILLIAM C. DURKEE,
Clerk District Court, Blue Earth County, Minnesota.

10 STATE OF MINNESOTA,
County of Blue Earth, ss:

George Maxfield and Henry Foster came before me personally, and, being by me first duly sworn, doth say, each for himself, that he is the surety above named; that he is a resident and freeholder in Blue Earth County, State of Minnesota, and worth the amount of one thousand dollars specified in the foregoing bond, above his debts and liabilities and exclusive of his property which is exempt from execution.

GEORGE MAXFIELD.
HENRY FOSTER.

Subscribed and sworn to before me this 29th day of December, 1871.

[SEAL.] WILLIAM C. DURKEE,
Clerk District Court, Blue Earth County, Minnesota.

(Endorsed:) I hereby approve the within bond.

C. G. RIPLEY,
Chief Justice.

11 STATE OF MINNESOTA,
Supreme Court:

THOMAS D. WARREN
vs.
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Foster (formerly Van Brunt) and A'son T. Foster, her husband, Mary E. Van Brunt, by Flora E. Van Brunt, her guardian ad litem—heirs of the late George M. Van Bruant; John A. Willard, James R. Brink, and William S. Sargent, impleaded with John C. Wise, Isaac Marks, James McMurtrie, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John Farrington, William J. Duley, Christiana Faatz, John H. Ray, and Asa White.

It is hereby agreed that M. J. Severance, M. S. Wilkinson, and C. K. Davis be substituted as attorneys and counsel for the plaintiff in the above-entitled action in said court, and in all other courts in which said action has ever been or is now pending.

Dated December 20th, 1871.

FINCH & PITCHER,
Attorneys for Plaintiff.

12 (Endorsed:) Due service admitted this 28th day of December, A. D. 1871, at Mankato.

FRANKLIN H. WAITE.
WILLARD & BARNEY.

13 STATE OF MINNESOTA,
County of Blue Earth:

In district court, sixth district.

THOMAS D. WARREN
vs.
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Foster and Anson T. Foster, her husband, and Mary E. Van Brunt, by Flora E. Van Brunt, her guardian ad litem—heirs of George M. Van Brunt, deceased; John C. Wise, Isaac Marks, James HcMurtrie, J. R. Brink, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John A. Willard, John Farrington, William J. Duley, William S. Sargent, Christiana Faatz, John H. Ray, and Asa White.

Take notice that the defendants Flora E. Van Brunt, Henrietta E. Foster (formerly Van Brunt) and A'son T. Foster, her husband, and Mary E. Van Brunt, by Flora E. Van Brunt, her guardian ad litem; John A. Willard, James R. Brink, and William S. Sargent, appeal to the supreme court of the State of Minnesota from the judgment of the district
14 court in this action, entered on the 24th day of May, 1866, in the office of the clerk of the county of Blue Earth.

Dated May 24th, 1866.

F. H. WAITE,
Att'y for Def'ts Flora E. Van Brunt, Henrietta E. Foster, and Anson T. Foster, her husband, Mary E. Van Brunt and J. R. Brink, Flora E. Van Brunt, as guardian for Mary E. Van Brunt.
WILLARD & BARNEY,
Atty's for Willard and Sargent.

To Z. PADDOCK, Esq.,
Clerk of District Court in and for Blue Earth County.

STATE OF MINNESOTA,
County of Blue Earth:

District court, sixth district.

THOMAS D. WARREN
ag'st
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Van Brunt (now Henrietta E. Foster) and Anson F. Foster, and Mary E. Van Brunt, minor heirs of George M. Van Brunt, deceased; John C. Wise, Isaac Marks, James McMurtrie, J. R. Brink, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum,
15 George Culver, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John A. Willard, William S. Sargent, Christiana Faatz, John H. Ray, and Asa White.

Take notice that the plaintiff, Thomas D. Warren, appeals to the supreme court of this State, to be held in St. Paul, on the first Tuesday of July next, from all that portion of the judgment in this case that adjudges any portion of the forty acres in dispute to any of the defendants.

Yours, &c.,

FINCH & PITCHER,
Attorneys for Pl'ff.

To F. H. WAITE,
Att'y for part of Defendants.
Messrs. WILLARD & BARNEY,
Attorneys for part of Defendants.

JUNE 18, 1866.

STATE OF MINNESOTA,
County of Blue Earth:

District court, sixth judicial district.

THOMAS D. WARREN
against
FLORA E. VAN BRUNT, WIDOW OF
16 George M. Van Brunt, deceased; Henrietta E. Van Brunt and Mary E. Van Brunt, minor heirs of George M. Van Brunt, deceased; John C. Wise, Isaac Marks, James McMurtrie, James R. Brink, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, (George Becker,) Freeman O. Webster, John A. Willard, John Farrington, William J. Dudley, William S. Sargent, Christiana Faatz, John H. Ray, and Asa White.

Thomas D. Warren, the plaintiff in the above-entitled action, complaining against the above-named defendants therein, shows to the court—

That, on or about the fifth day of June, 1853, this plaintiff took possession of and made improvements upon the following described lands situate in the said county of Blue Earth, to wit: The southeast quarter of the northeast quarter of section thirteen, in township one hundred and eight north, of range twenty-seven west, and the northwest quarter of the southwest quarter and the south half of the northwest quarter of section eighteen, in township one hundred and eight north, of range twenty-six west, and immediately settled and resided on the same
17 with his family.

That he made the said improvements on the said land, and built his dwelling-house, and settled and resided with his family thereon, with the design and for the purpose of acquiring the right to enter and purchase the said land of the United States, under and by virtue of the pre-emption laws of the United States.

That, in the winter of 1855–6, while he was so residing with his family in the dwelling-house which he had erected on the said land, and as soon as he was able to describe the same by Government subdivisions, he filed in land-office in the land-district in which the said lands were situated, his declaratory statement, claiming his right to enter and purchase the said lands, under and by virtue of the pre-emption laws of the United States in such case made; and this plaintiff claims and insists that he then had a full, perfect, and indefeasable right to so enter and purchase the said land, and the whole thereof, under and by virtue of the laws aforesaid; and he says that he has never in any way, manner, or form released, surrendered, abandoned, or forfeited his said right of pre-emption to said land.

18 That, before the filing of his declaratory statement aforesaid, the said George Van Brunt, in his life-time, had assisted this plaintiff in building a log dwelling-house on the said southeast quarter of the northeast quarter of the said section thirteen, and this plaintiff had broken and cultivated about five acres of land on the same forty.

That, afterwards, and on or about the 4th day of February, 1854, this

plaintiff paid the said Van Brunt in full for his assistance and expenditures in making the said improvements, and the said Van Brunt received such payment in full therefor, and from that time the said forty in said section thirteen belonged to this plaintiff exclusively, and was subject exclusively to his right of pre-emption thereto; but, by agreement between this plaintiff and the said Van Brunt, he, the said Van Brunt, had the privilege to remain and reside in the said log-house on the said forty, as the tenant of this plaintiff, until the first of May, 1854; that the said Van Brunt did, pursuant to said agreement between him and this plaintiff, remain in said house till the expiration of his said term, to wit, the first of May, 1854, and then refused to surrender to this plaintiff the possession thereof, according to his said agreement;
19 that this plaintiff thereupon commenced legal proceedings to dispossess the said Van Brunt of the said house, which proceedings resulted in ousting the said Van Brunt, and putting this plaintiff in possession thereof, and he has ever since that time held possession thereof, most of the time by his tenants in the said log-house.

That, prior to the time when the public surveys of the said lands were made and the plats thereof returned to the proper land-office, neither the said Van Brunt or this plaintiff knew how the said improvements were located or situated with reference to the legal subdivisions of the land to be made by such surveys, but when the surveys were completed and the plats thereof so returned, the said improvements were found to be on the said forty acres last above mentioned, and this plaintiff says that he made the first improvement, and was the first settler upon and the first occupant of the said last-mentioned forty acres; and that with reference to the same he complied fully with all the laws of the United States, granting the right of pre-emption to actual settlers upon public lands, and was in the law entitled to enter and purchase the
20 same by pre-emption, and that no other person had any such right thereto.

And this plaintiff further shows to the court that the said George M. Van Brunt, in his life-time, though he had sold and received payment in full, and then parted with all interest in and claim for the improvements made as aforesaid on the said land, to this plaintiff, afterwards made improvements of his own on the same tract or subdivision of forty acres of land, and, as soon as he ascertained that the improvements so made by him were on the said last-mentioned forty acres, he filed in the said land-office a declaratory statement claiming the right to enter and purchase by pre-emption the said forty acres, together with the north half of the southeast quarter, and the northwest quarter of the northwest quarter of said section thirteen, though he neither owned or had made any improvements thereon till long after the said improvements made by this plaintiff, and after he (Van Brunt) had sold to this plaintiff all interest in and claim to said first improvements on said forty, as hereinbefore stated, and that the said Van Brunt, at the time
21 when he so made and filed his said declaratory statement, well knew that this plaintiff had made the first settlement and improvements on the said forty acres, and was then in the possession thereof, and the only rightful claimant thereto, on which he based his pretense to a right of pre-emption to the said forty acres, had been made long subsequent to those of this plaintiff.

That after this plaintiff so as aforesaid purchased of said Van Brunt all his interest in the improvements on the said forty acres, and while the said Van Brunt occupied the said log-house thereon as the tenant of this plaintiff as aforesaid, this plaintiff erected on his said claim an-

other house, which, when the public surveys were made, was found to be located on the southwest quarter of the northwest quarter of said section 18; that while he was so erecting the said last-mentioned house and preparing the same for his own residence, he lived with his family in the town of Mankato, and only a short distance from said claim; that he so lived in Mankato from about the 18th day of July, 1853, till the month of October, 1853, when he moved with his family into the last-
22 mentioned house on his said claim, and has ever since that time resided and still resides thereon; that he so resided in Mankato from July to October, 1853, as a matter of convenience while he was engaged in building his house on said claim, and because he had leased as aforesaid to said Van Brunt the said log-house which had been built on said forty, and which was then occupied by said Van Brunt, under and as the tenant of this plaintiff; that he did not, when he so leased the said log-house to said Van Brunt, and himself lived in Mankato, in any manner or to any extent whatever, abandon or relinquish his said possession and improvements, or either of them, but continued during the time he so lived in Mankato to work and make further improvements on his said claim for the purpose and with the intent to hold and preserve his right thereto and the whole thereof, and to reside thereon as soon as he should be able to prepare a house thereon proper to reside in, and that said Van Brunt at that time well knew all of this plaintiff's said intentions, purposes, and acts touching his said claim and the whole thereof; that, afterwards, and in the winter of 1855, the said George M. Van Brunt died intestate, leaving him
23 surviving, Flora E. Van Brunt, his widow, and Henrietta E. Van Brunt and Mary E. Van Brunt, his infant children and heirs at law, and the said widow, Flora E. Van Brunt, was afterwards appointed and qualified administratrix of the estate of the said George M. Van Brunt, deceased.

That the said Flora E. Van Brunt, as admi'stratrix of the estate of the said deceased claimed and insisted upon the right to enter and purchase the said forty acres in said section 13, under and by virtue of the said improvements made thereon by her husband in his life-time, and pursuant to the declaratory statement so aforesaid made and filed in the land-office by the said Van Brunt in his life-time; that, to sustain her said claim to the right to pre-empt the said forty acres of land as such administratrix, she well knowing that the first settlement thereon had been made by this plaintiff, and well knowing that the first improvements on said forty acres had been made, and were then owned, and possessed by this plaintiff, and also well knowing that this plaintiff had purchased of her husband in his life-time, and paid him for all claim and interest which he had or could have in the said first improve-
24 ment thereon, fraudulently and falsely set up, alleged and insisted before the land-officers at the land-office then at Winona, that the said George M. Van Brunt in his life-time made the first improvements and settlement on the said forty acres, and that this plaintiff had abandoned whatever of possession and improvements, or right of or claim to possession and pre-emption he might have had thereto; and sought to support and sustain her said allegations and her right to pre-empt the said forty acres of land by testimony before said land-officers, which was and which she well knew to be erroneous and untrue.

That she, and this plaintiff, believes by corrupt means, procured L. D. Smith, the receiver of said land-office, to sustain her said claim and right of pre-emption to said forty acres, and his decision thereon in her favor to be sustained and confirmed by the Commissioner of the General Land-

Office, and by the Secretary of the Interior, to whom this plaintiff appealed; that, in making his said decision, the said receiver perverted the evidence in the case, and misrepresented the facts proved by the evidence, and plainly misconstrued and violated the laws of the
25 United States, granting and regulating pre-emption rights to the public lands; that the Commissioner of the General Land Office, in sustaining and confirming the decision of the said receiver, based his decision mainly upon a statement of fact, which is untrue, and which the evidence in the case, and on which he acted, shows and proves to be untrue; and that the said decision of the said receiver and the said confirmation thereof are unfounded in law or fact, and are violations of the laws of the United States upon the subject of pre-emptions of the public lands, and contrary to equity, good conscience, and the law of the land.

That, though this plaintiff believes that the said decisions and confirmations were procured and produced to be made by frauds and corruptions practised by the said Flora E. Van Brunt with the said land-officers or some one of them, he is unable to state the precise facts or nature of the facts constituting the said fraud or corruption, but he is informed and believes, and therefore alleges the facts to be that the said Flora E. Van Brunt, by some means, procured the said receiver not to transmit the papers and evidence in the case to the General Land-
26 Office in the ordinary course of business, but to detain the same until he, the said receiver, should be able to take them in person to the General Land-Office; that, though this plaintiff often requested the said receiver to transmit said papers and evidence to the General Land-Office immediately, he neglected and refused so to do, but detained them, (as this plaintiff believes, fraudulently and corruptly,) in his possession from the time of the hearing of the case, at said land-office, on the 20th of March, 1856, till February, 1857, and then himself in person took the said papers and evidence to the General Land-Office; that the said receiver then and there, by some means unknown to this plaintiff, but which he believes to have been fraudulent and corrupt, procured a decision to be written out by a clerk in the General Land-Office, perverting and misconstruing the evidence in the case, and sustaining, and affirming his decision therein, and the same to be adopted and signed by the Commissioner of the General Land-Office, and afterwards, by similar means and through agents unknown to this plaintiff, procured the said opinion and illegal decision to be sustained and
27 confirmed by the Secretary of the Interior.

And this plaintiff says that, by such fraudulent, corrupt, and partial acts and proceedings of the receiver and other land-officers, his legal and equitable rights to the said forty acres of land were manifestly violated to his injury and damage; that he was thereby denied and deprived of his lawful and exclusive right to enter and purchase the said forty acres of land, under and by virtue of the laws of the United States upon the subject of the pre-emption of the public lands by actual settlers, and that the said acts and doings of the said Flora E. Van Brunt and of the said land-officers are contrary to equity and good conscience, and are to the manifest injury of this plaintiff.

That, under and by virtue of the said unlawful, fraudulent, and corrupt allowance to the said Flora E. Van Brunt, as administratrix as aforesaid, to enter and purchase the said forty acres of land, she has entered and purchased the same, and pursuant to such entry and purchase a patent therefore has been duly signed and issued by the
28 proper officers of the United States to the said heirs of George M.

Van Brant therefor, and she now claims to own and hold the same as such administratrix or as guardian of her said infant children, contrary to equity and good conscience, and against the rights and to the manifest injury of this plaintiff.

And this plaintiff further states that the improvements so as aforesaid made by him on the said forty acres of land far exceed in value the improvements subsequently made thereon by the said Van Brunt in his life-time, and in virtue of which his widow and the administratrix of his estate was allowed to enter and purchase the same by pre-emption; that this plaintiff has often requested and demanded of the said Flora E. Van Brunt that she and said heirs release and convey to this plaintiff the said forty acres of land, and always has been and still is willing, and has offered to pay to her the purchase-money which she was obliged to pay for said land, but she has at all times refused and still refuses to so release or convey to this plaintiff the said land, as she and they in equity and good conscience ought to do. And the plaintiff further states that he is informed and believes that each of the
29 following named persons, to wit: John C. Wise, Isaac Marks, James McMurtrie, J. R. Brink, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alfred Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John A. Willard, John Farrington, William J. Duly, William S. Sargent, Christiana Faatz, John H. Ray, and Asa White, claim to have some right, title, interest, or estate in some specific or definite portion or parcel of the said forty acres of land by purchase from William S. Sargent, late guardian of the said infant children and heirs at law of the said deceased, or otherwise, and this plaintiff believes and charges that each of said persons who so claim an interest or estate in or title to any part or parcel of said land acquired, and received the same with full notice and acknowledge of the plaintiff's claim and right thereto. And this plaintiff further shows that the said Sargent has resigned his guardianship of the said children, and the said Flora E. Van Brunt has been appointed and is now acting as the guardian of the said infant children, and as such guardian she has instituted and is now prosecuting proceedings in the probate court
30 of the said county of Blue Earth, to have lands or a large and valuable part thereof, sold in parcels or town-lots or otherwise at public auction, for the benefit of the said infant children, and has caused to be published a notice of such sale to be had on the 8th day of the present month of August, 1864, at the town of Mankato in said county, which proceedings and proposed sale are in violation of the right of this plaintiff in the said lands, and such sale, if made, will occasion to this plaintiff injuries irreparable at law.

The premises being considered, this plaintiff asks and demands the judgment or decree of this court, that the said Flora E. Van Brunt in person, and as administratrix of the estate of the said George M. Van Brunt, deceased, and as guardian of the said infants, Henrietta E. Van Brunt and Mary E. Van Brunt, release and convey to this plaintiff and his heirs and assigns forever, said heirs each for herself by deed of conveyance in due form of law sufficient to grant and convey all the right, title, interest, or estate which she in her own right or as administratrix of said estate may or can have in or to the said lands and appurtenances, and also all the right, title, interest and estate
31 which the said Henrietta E. Van Brunt and Mary E. Van Brunt or either of them may or can have therein as heirs at law of the said George M. Van Brunt, deceased, or otherwise, and that for the purposes of such release and conveyance to this plaintiff, the said Flora

E. Van Brunt and said heirs be determined and declared to have been from the time of said purchase and entry of said land, and still to be, vested with the legal title thereto in trust to the use and for the benefit of this plaintiff, and be required to execute such trust by such release and conveyance of said land to this plaintiff.

That each and every of the said other defendants in this action be required and decreed to release and convey to this plaintiff, his heirs and assigns forever, all right, title, interest, or estate which he may or can have in or to the piece or parcel of said land claimed by him, by good and sufficient deed for that purpose. That, in case of neglect or refusal on the part of any or either of the defendants to so execute and acknowledge, and deliver such release or conveyance as may be required by said decree, then that this decree may stand and operate effectually in the law as such release or conveyance, and be recorded as
32 such.

That this plaintiff recover against the said defendants or some or one of them his costs and charges in this action.

And this plaintiff prays that a writ of injunction may be issued out of this court and under the seal thereof, restraining the said defendants and each of them from and enjoining them against selling, conveying, granting, assigning, releasing, incumbering, or in any manner disposing of the said lands or any part or parcel thereof until the further order of this court in the premises.

Dated August 7th, 1864.

FINCH & PITCHER,
Att'ys for Plaintiff.

COUNTY OF BLUE EARTH, *ss:*

Thomas D. Warren, being duly sworn, deposes and says that he has heard read the foregoing complaint, that he is plaintiff therein, and that the same is true of his own knowledge, except in regard to those matters therein stated upon information and on belief, and in regard to those matters he believes it to be true.

T. D. WARREN.

33 Subscribed and sworn to before me this 22nd day of February, 1865.

[SEAL.] E. P. FREEMAN,
Notary Public.

STATE OF MINNESOTA,
County of Blue Earth:

In district court, sixth district.

THOMAS D. WARREN
vs.
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Van Brunt and Mary E. Van Brunt, minor heirs of George M. Van Brunt, deceased; John C. Wise, Isaac Marks, James McMurtrie, J. R. Brink, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alvin M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John A. Willard, John Farrington, William J. Duley, William S. Sargent, Christiana Faatz, John H. Ray, and Asa White.

The answer of the defendants, John C. Wise, Isaac Marks, James Van Blarcum, Mary Jane Van Blarcum, George Culver, Sheldon F. Barney, John A. Willard, John Farrington, William S. Sargent, Christi-
34 ana Faatz, Asa White, John H. Ray, by Willard and Barney, their attorneys, to the complaint herein, upon information and belief, states and shows to the court that they deny that the plaintiff first or ever singly by himself took possession of, or settled upon, or made improvements on the southeast quarter of the northeast quarter of section thirteen in township one hundred and eight, and range twenty-seven, in said county of Blue Earth, but say that the plaintiff and George M. Van Brunt, now deceased, first entered together upon said land and made the first improvements together, including the erection of the house mentioned in the complaint, on joint expense, and for some time thereafter occupied said house with their families, intending at the time to pre-empt a half section of land. That, subsequently, this plaintiff paid said Van Brunt for his interest in said house, but for no other improvements then made on said land. At the same time the plaintiff and said Van Brunt divided their claims by running a line where they supposed the survey line on the east side of said forty acres would come, which came near to and on the west side of said house, and when the Government survey was made it was found that said agreed line run diagonally and cut off some
35 four & a half acres from the northeasterly corner of said forty acres and some four acres off the forty lying east of it and which composed part of the plaintiff's claim, which last-named four acres was claimed by and was yielded to the plaintiff by said Van Brunt when the Government survey was made. At the same time the plaintiff released the improvements, except said dwelling-house on the west side of said surveyed line, to said Van Brunt, and thereby consented and fully intended that he should occupy and should pre-empt the first mentioned forty acres. And the said Van Brunt continued to make improvements thereon by plowing some twenty acres, and by fencing the same, and immediately after he was dispossessed of said house, erected another house thereon, all of which was done by the consent and agreement of the plaintiff, which was immediately occupied by said Van Brunt and his family, in which house said Van Brunt continued to reside until his decease on the 5th day of January, 1855, and his family have ever since resided on the said forty. That, on the 19th day of July, 1855, the said George M. Van Brunt, while he was living with his family in the said last-mentioned house, filed in the land-office of the district in which
36 such lands were situated, his declaratory statement claiming his right to enter and purchase the north half of the southeast quarter and the south half of the northeast quarter of section thirteen, in town. 108, of range 27, in Blue Earth County aforesaid, as a pre-emption right, under the act of Congress of 4th September, 1841, and therein alleged that he was then a citizen of the United States, and the head of a family, and over the age of twenty-one years, as in fact he then was. After his decease the said Flora E. Van Brunt, as sole administratrix of his estate, did, on the 23d day of May 1857, make before the register of the said land-office the affidavit required by the 13th section of said pre-emption act of Congress according to the form in such case prescribed by the Commissioner of the Land-Office, and filed the same with the said register, and did pay unto said land-officer the Government price of said quarter section of land. She also made satisfactory proof of the truth of said allegation to the said register and receiver.

The defendants also show that the plaintiff, on the 7th day of March, 1856, served a notice on said Flora E. Van Brunt, administratrix, that

he should contest the claim and right to said forty acres first
37 herein described, and in pursuance thereof the plaintiff and said Flora E. Van Brunt, administratrix, appeared before the register and receiver of said land-office, and introduced and examined their witnesses, and, after argument of the counsel, submitted such matter of contest to said land-officers. The receiver sustained the claim of said Van Brunt, and adversely to the plaintiff, and the register decided in favor of the plaintiff. In consequence whereof the case, with the proofs and papers therein, were sent to the Commissioner of the General Land-Office for his decision, who, after investigation, decided in favor of the claim of said Van Brunt, and adversely to the claim of the plaintiff. And thereupon the plaintiff appealed from his decision to the Secretary of the Interior, who, after appearance of the parties to said appeal, by their counsel, and after full argument by them, affirmed the aforesaid decision of the Commissioner of the General Land-Office. And, in pursuance of such decision, a patent, covering the quarter section described by said Van Brunt's claim, including the said contested forty acres, was issued by the Government of the United States to the heirs of the said George M. Van Brunt, deceased, bearing date the 15th day of May, 1860.

38 And these defendants deny that the plaintiff settled or resided with his family on the said disputed forty acres with the design or purpose of acquiring the right to pre-empt the same, or that he expended any money in the erection of said house, or in making any other improvements on said forty with any such intention.

They also deny that the plaintiff ever paid said Van Brunt for any improvements made by him on said forty acres, except for his interest in said dwelling-house, which they allege he received under the supposition and belief that said house was not situated on said forty acres, and they deny that said Van Brunt ever occupied the said house as a tenant of the plaintiff, but allege that it was a part of the bargain when said Van Brunt sold his interest in the house that he should occupy it so long as he did occupy it, and even longer; and the defendants allege that, at the time he so purchased the interest of said Van Brunt to said house, the plaintiff fully believed the same was situated on the southwest quarter of the northwest quarter of section 18, township 108, range 26, in said county. They also deny that the plaintiff has had pos-
39 session of said house either by himself as tenant for the last years. They also deny that said Van Brunt barred his right of pre-emption solely on improvements he made on said contested forty after he parted with his interest in said house, but claim that he relied upon all the improvements he had made, or assisted in making, except the house, and allege that he made, or assisted in making, improvements on both sides of said agreed line when he first settled upon said forty acres, and the right to which he never sold or parted with. And these defendants say they have no knowledge or information sufficient to form a belief as to the time when the plaintiff moved to Mankato with his family, nor the length of time he remained there, though some of the defendants recollect of the fact of his removing to and living in Mankato. These defendants also deny that the plaintiff ever complied with the pre-emption laws of the United States in relation to said disputed forty acres, or that he was ever entitled to pre-empt the same, and also deny that he has ever been possessed of said forty acres.

They also deny that said Flora E. Van Brunt either falsely or
40 fraudulently set up before the land-officers at Winona any act or transaction whatever, particular' in relation to the fact as to who

made the first improvements or settlement on said forty, but allege that she then made the same representations as are made in this answer; and they deny that she introduced any testimony before the land-officers which was erroneous or untrue. The defendants deny that said Flora E. Van Brunt used any corrupt means to procure L. D. Smith, the receiver of the land-office, to sustain the claim or right of pre-emption of herself or the heirs of said Van Brunt to said forty acres, or to procure his decision to be confirmed by the Commissioner of the General Land-Office, or by the Secretary of the Interior.

They deny that said receiver, in making his decision, perverted the evidence in the case, or misrepresented the facts proven therein, or that he misconstrued or violated the laws of the United States. Also they deny that the Commissioner of the General Land-Office based his said decision upon any statement of facts that is untrue, or that the decision of said receiver, or the confirmation thereof, are or were unfounded in law or fact, or were in violation of any law of the United States
41 then existing. They further deny that said decision or confirmation were produced or procured by any fraud or corruption practiced by said Flora E. Van Brunt, or any other person. They also deny that Flora E. Van Brunt procured or sought to procure the said receiver to retain or delay the return of the papers or evidence in said contested case to the General Land-Office for any time whatever, or for any purpose whatever, and these defendants have no knowledge or information sufficient to form a belief as to whether the plaintiff ever requested said register to transmit them to said Commissioner, or said papers in his office or possession. They also deny, upon information and belief, that said receiver procured any decision in the case to be written out by a clerk of the Land Department, and also deny that she used any fraudulent, corrupt, or improper means to procure a decision of said case either by the Commissioner or the Secretary of the Interior.

They also deny that any improvements made on said forty, and which said Warren assisted in making, besides the erection of said house, amounted in the aggregate to more than twenty-five dollars,
42 and they allege said Van Brunt assisted in making all of them. They consisted simply of the breaking of about two acres of land, and about rails partly laid into fence, and in the aggregate are of far less value than the improvements made thereon by said Van Brunt. And these defendants further show that the plaintiff did settle upon and erect a dwelling-house upon the piece of land next herein described, and did, on the 24th day of December, 1853, file with the register of the land-office aforesaid his declaratory statement to pre-empt the same under the provisions of said act of 4th September, 1841, and has continued to reside thereon ever since, and on or about the 25th day of January, 1859, did pre-empt under said act the northwest quarter of the southwest quarter, and the south half of the northwest quarter of section eighteen, in township one hundred and eight, and range twenty-six, in Blue Earth County aforesaid, and paid the Government therefor, and accepted and received a patent thereof, but of what date such patent was issued these defendants are not informed.

And these defendants, each for himself, denies, upon their own knowledge, that he has purchased any part of said forty acres, with no-
43 tice of the plaintiff's claim thereto or with knowledge thereof, but each claims that he purchased his interest therein in good faith, and for a valuable consideration, long before the commencement of this action, and long after the patent had been issued to the heirs of George M. Van Brunt, deceased, for said premises. These defendants

admit that they heard a rumor that the plaintiff had claimed and contested at the land-office the right of said Van Brunt's heirs to said lands, but always heard that said plaintiff was defeated in such contest, and that a patent had issued to said heirs several years before either of these defendants purchased their interest therein.

And these defendants do, each for himself, severally, upon his own knowledge, aver: First, the said John C. Wise avers that he purchased his interest at the said guardian sale, and now owns what is described lots 28 & 29 by a map or plat on record in the office of the judge of the probate court of Blue Earth County, in book I, page 94, of minutes of probate court.

And the said Isaac Marks in his behalf alleges that he owns 33 feet of lot 30, by said plat, and purchased the same of James McMur-
44 trie, who purchased the same at said guardian sale.

And the said George Culver and said John Farrington allege that they own lots 20 & 27 by said plat, purchased of Flora E. Van Brunt, who purchased the same of James McMurtrie, who purchased the same at said guardian sale; and they also own lots 23, 24, 25, 34, & 35 by said map or plat, purchased of said James McMurtrie, who purchased at said guardian sale. And the said William S. Sargent for himself avers that he owns lot 6, by the said map or plat, and purchased the same of James McMurtrie, who purchased the same at said guardian sale. And the said Christiana Faatz on her part alleges that she owns lot 26 by said map or plat, and that she purchased the same of James McMurtrie, who purchased at said guardian sale. And the said Isaac Marks and Asa White allege on their part that they jointly own lot 10 by said plat or map, and that they purchased the same of James McMurtrie, who purchased at said guardian sale. And the said Sheldon F. Barney on his part alleges that he purchased his interest, which he now owns and holds, being lot 3 by said map or plat, of Arza B. Barney, who knew nothing of any claim or contest of said plaintiff, and
45 which said lot was first purchased at said guardian sale. And the said John A. Willard on his part alleges that he owns lots one and two by said map and plat, and that he purchased the same of Isaac Marks, who purchased the same of Freeman O. Webster, named in the complaint, who purchased the same of James McMurtrie, who purchased the same at said guardian sale. And the said James Van Blarcum on his part alleges that he owns lot 11 by said map or plat, that he purchased the same of James McMurtrie, who purchased the same at said guardian sale. And the said Mary Jane Van Blarcum on her part alleges that she owns lot 12 by said map or plat, and that she purchased the same of James McMurtrie, who purchased the same at said guardian sale. And the said Alvin M. Collins, who is misnamed Alfred in the complaint, on his part alleges that he owns lot 9 and 4 feet of 10 by said map or plat, and that he purchased the same of James McMurtrie, who purchased the same at said guardian sale. And said John H. Ray alleges that he owns the north 33 feet of lot 30 and lots 31 & 32 by said map or plat, and that he purchased the same of Isaac Marks, who purchased at said guardian sale.

46 Wherefore the defendants pray that this action may be dismissed with costs.

WILLARD & BARNEY,
Att'ys for said Defendants.

STATE OF MINNESOTA,
County of Blue Earth, ss:

John A. Willard, John C. Wise, and Sheldon F. Barney, Isaac Marks

& John H. Ray, of the above mentioned county and State, being each duly sworn, doth each severally depose and say as follows, that they have each read the foregoing answer and know the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated upon information and belief, and as to those matters they believe the same to be true. And the said Sheldon F. Barney does further depose and say that he is one of the attorneys for defendants George Culver, John Farrington, William S. Sargent, Christiana Faatz, & Alvin M. Collins; that all but Christiana Faatz are not now within this county and cannot be got in time to make this verification, wherefore this deponent makes it; that he believes the said to be true; that the grounds of deponent's belief are facts
47 ascertained from the records and from statements which he has received as to the facts upon inquiries made by him in reference to said action; that he has taken pains to ascertain the facts connected with this action to enable him to defend the same, he having an interest therein; and besides, he is acquainted with many of the facts alleged in said answer, and has counseled with most of the defendants concerning said suit.

And deponent further says that said Christiana Faatz is not now in Mankato where her attorney resides, but is some two miles from her attorney, and cannot be got in time to make this verification, and deponent makes it for her.

J. A. WILLARD.
ISAAC MARKS.
S. F. BARNEY.
JOHN C. WISE.
JOHN H. RAY.

Subscribed and sworn to before me April 15th, 1865.
[SEAL.] E. P. FREEMAN,
Notary Public, Blue Earth Co., State of Minnesota.

(Endorsed:) Served by copy upon us, April 15th, 1865.
FINCH & PITCHER,
Att'y for Plaintiff.

48 STATE OF MINNESOTA,
County of Blue Earth:

(In district court, sixth district.

THOMAS D. WARREN
vs.
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Van Brunt and Mary E. Van Brunt, minor heirs of George M. Van Brunt, deceased; John C. Wise, Isaac Marks, James McMurtrie, J. R. Brink, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John A. Willard, John Farrington, William J. Duley, William S. Sargent, Christiana Faatz, John H. Ray, and Asa White.

The answer of the defendants, Flora E. Van Brunt, James McMurtrie, J. R. Brink, Marshall T. Comstock, George M. Hoffhein, by Franklin H. Waite, their attorney, and of Henrietta E. Van Brunt and Mary E. Van Brunt, minor heirs, by the said Flora E. Van Brunt, their guardian ad litem, to the complaint herein, all of whom answer upon information and belief, except said Flora E. Van Brunt, who answers upon her own knowledge, except as expressly excepted, shows to the
49 court that they deny that the plaintiff first or ever singly by himself took possession of or settled upon or made improvements on the southeast quarter of the northeast quarter of section thirteen, in township 108 and range 27, in said county of Blue Earth; but say that the plaintiff and George M. Van Brunt, now deceased, first entered together upon said land and made the first improvements together, including the erection of the house mentioned in the complaint on joint expense, and for some time thereafter occupied the house with both their families, intending at the time to pre-empt a half section of land; that, subsequently, the plaintiff paid said Van Brunt for his interest in said house, but for no other improvements then made on said land. At the same time the plaintiff and said Van Brunt divided their claims by running a line where they supposed the survey line on the east side of said forty acres would come, which came near to and on the west side of said house, and when the Government survey was made, it was found that such agreed line ran diagonally and cut off some four and a half acres from the northeasterly corner of said forty acres, and some four
50 acres off the forty lying east of it and which composed part of the plaintiff's claim, which last-named four acres was claimed by and was yielded to the plaintiff by said Van Brunt when the Government survey was made. At the same time, as the defendant Flora E. Van Brunt is informed and believes, the plaintiff released the improvements, except said dwelling-house, on the east side of said agreed line, to said Van Brunt, and thereby consented and fully intended that he should occupy and should pre-empt the first mentioned forty acres. And the said Van Brunt continued to make improvements thereon by plowing some twenty acres and by fencing the same, and immediately after he was dispossessed of said house erected another house thereon, all of which was done by the consent and agreement of the plaintiff, which was immediately occupied by said Van Brunt and his family, in which house said Van Brunt continued to reside until his decease, on the 5th day of January, 1855, and his family have ever since resided on the same forty; that, on the 19th day of July, 1855, the said George M. Van Brunt, while he was living with his family in the said last-named house, filed
51 in the land-office of the district in which said land are situated his declaratory statement, claiming his right to enter and purchase the north half of the southeast quarter and the south half of the northeast quarter of section thirteen, in town. 108, of range 27, in Blue Earth County aforesaid, as a pre-emption right, under the act of Congress of the 4th September, 1841, and therein alleged that he was then a citizen of the United States and the head of a family, as in fact he then was. After his decease the said Flora E. Van Brunt, as sole administratrix of his estate, did, on the 23rd day of May, 1857, make before the register of the said land-office the affidavit required by the 13th section of said pre-emption act of Congress, according to the form in such cases prescribed by the Commissioner of the Land-Office, and filed the same with said register, and did pay into said land-office the Government price of said quarter section of land. She also made satisfactory proof of the truth of said allegations to the said register and receiver. The

defendants also show that the plaintiff, on the 7th day of March, 1856, served a notice on said Flora E. Van Brunt, administratrix, that
52 he should contest the right and claim to said forty acres first herein described, and, in pursuance thereof, the plaintiff and said Flora E. Van Brunt, administratrix, appeared before the register and receiver of the said land-office, and introduced and examined their witnesses, and, after argument by their counsel, submitted such matter of contest to the land-officers. The receiver sustained the claim of said Van Brunt and decided adversely to the plaintiff, and the register decided in favor of the plaintiff. In consequence hereof, the case with the proofs and papers therein were sent to the Commissioner of the General Land-Office, for his decision, who, after investigating, decided in favor the claim of said Van Brunt and adversely to the claim of the plaintiff. And thereupon the plaintiff appealed from his decision to the Secretary of the Interior, who, after the appearance of the parties to said appeal, by their counsel, and after full argument by them, affirmed the aforesaid decision of the Commissioner of the General Land-Office.

And in pursuance of said decision, a patent covering said quarter section described by said Van Brunt's claim, including the said contested forty acres, was issued by the Government of the United States to the heirs of the said George M. Van Brunt, deceased, bearing date
53 the 15th day of May, 1860. And these defendants deny that the plaintiff settled and resided with his family on the said disputed forty acres, with the design or purpose of acquiring the right to pre-empt the same, or that he expended any money in the erection of said house or in making any other improvements on said forty with any such intention. They also deny that the plaintiff ever paid said Van Brunt for any improvements made by him on said forty acres, except for his interest in said house, which, they allege, he received under the supposition and belief that said house was not situated on said forty acres. And they deny that said Van Brunt ever occupied the said house as a tenant of the plaintiff, but allege that it was a part of the bargain when said Van Brunt sold his interest in the house, that he should occupy it so long as he did occupy it, and even longer. And the defendants allege that, at the time he so purchased the interest of said Van Brunt to said house, the plaintiff fully believed the same was situate on the southwest quarter of the northwest quarter of section 18, town. 108,
54 range 26, in said county. The also deny that the plaintiff has had possession of said house, either by himself or tenant, for the last several years. They also deny that said Van Brunt vested his right of pre-emption solely upon improvements he made on said contested forty , after he parted with his interest in said house, but claim that he relied upon all the improvements he had made or assisted in making, except the house, and allege that he made or assisted in making improvements on both sides of said agreed line, when he first settled upon said forty acres, and the right to which he never sold or parted with. And these defendants say that they have no knowledge or information sufficient to form a belief as to the time when the plaintiff removed to Mankato with his family, nor the length of time he remained there, though some of the defendants recollect of the fact of his moving to and living in Mankato.

These defendants also deny that the plaintiff ever complied with the pre-emption laws of the United States in relation to said disputed forty acres, or that he was ever entitled to pre-empt the same; and also deny that he has ever been possessed of said forty acres. They also

55 deny that the said Flora E. Van Brunt either falsely or fraudulently set up before the land-officers at Winona any act or transaction whatever, particularly in relation to the fact as to who made the first improvements or settlement on said forty , but allege that she then made the same representations as are made in this answer; and they deny that she introduced any testimony before the land-officers which was erroneous or untrue. These defendants deny that said Flora E. Van Brunt used any corrupt means to procure L. D. Smith, the receiver of the said land-office, to sustain the claim or right of pre-emption of herself or the heirs of said Van Brunt to said forty acres, or to procure his decision to be confirmed by said Commissioner of the General Land-Office, or by the Secretary of the Interior. They deny that the said receiver, in making his decision, perverted the evidence in the case, or misrepresented the facts proved therein, or that he misconstrued or violated the laws of the United States. Also, they deny that the Commissioner of the General Land-Office based his said decision upon any statement of fact that is untrue, or that the decision of said receiver, or the confirmation thereof, are unfounded in law or fact,
56 or are violations of any law of the United States then existing. They further deny that the said decision or confirmation were produced or procured by any fraud or corruption practiced by said Flora E. Van Brunt or any other person.

They also deny that the said Flora E. Van Brunt procured or sought to procure the said receiver to retain or delay the return of the papers in said contested case to the General Land-Office for any time whatever, or for any purpose whatever. And these defendants have no knowledge or information sufficient to form a belief as to whether the plaintiff ever requested said register to transmit them to said Commissioner, or as to how long he did in fact retain said papers in his office or possession. They also deny, upon information and belief, that said receiver procured any decision in the case to be written out by a clerk of the Land Department, and also deny that he used any fraudulent, corrupt, or improper means to procure a decision of said cause, either by the Commissioner or the Secretary of the Interior. They also deny that any improvements made on said forty , and which said Warren assisted in making, besides the erection of said house, amounted in the aggregate to more than twenty-five dollars; and they allege said Van Brunt assisted in making all of them. They assisted simply in the
57 breaking of about two acres, and in the aggregate of far less value than the improvements made thereon by said Van Brunt. And the defendant further show' that the plaintiff did settle upon and erect a dwelling-house upon the piece of land next herein described, and did, on the 24th day of December, 1855, file with the register of the land-office aforesaid his declaration to pre-empt the same under the provisions of the said act of the 4th September, 1841, and has continued to reside thereon ever since; and, on or about the 25th day of January, 1859, did pre-empt, under said act, the northwest quarter of the southwest quarter, and the south half of the northwest quarter of section 18, in town. 108 and range 26, in Blue Earth County aforesaid, and paid the Government therefor, and accepted and received a patent thereof, but of what date such patent was issued these defendants are not informed. And these defendants, James McMurtrie, J. R. Brink, Marshall T. Comstock, and George M. Hoffhein, each for himself, denies, upon his own knowledge, that he has purchased any part of said forty acres with notice of the plaintiff's claim thereto or with knowledge thereof; but each claims that he purchased his interest therein

58 in good faith, and for a valuable consideration, at guardian's sale, as alleged in said complaint, and long before the commencement of this action, and long after the issuing of the Government patent of said land to the heirs of said George M. Van Brunt, deceased.

These defendants admit they heard a rumor that the plaintiff had claimed and contested at the land-office the right of said Van Brunt's heirs to said land, but always heard that said plaintiff was defeated on such contest and that the patent had issued to said heirs some years before either of these defendants purchased their interests therein.

FRANKLIN H. WAITE,
Attorney for Defendants aforesaid.

MRS. FLORA E. VAN BRUNT,
Guardian ad litem of Henrietta E. Van Brunt and Mary E. Van Brunt.

COUNTY OF BLUE EARTH, *ss:*

Flora E. Van Brunt and Marshall T. Comstock, two of the aforesaid defendants, being severally duly sworn, say each for herself and himself that the foregoing answer is true to his and her own knowledge, except as to those matters therein stated on information and belief, and as to those matters each believes it to be true.

MRS. FLORA E. VAN BRUNT.
59 MARSHALL T. COMSTOCK.

Sworn and subscribed this 15th day of April, 1865, before—
[SEAL.] JOHN C. WISE,
Notary Public for Minnesota.

COUNTY OF BLUE EARTH, *ss:*

Franklin H. Waite, being duly sworn, says he is the attorney of the defendants James McMurtrie, J. R. Brink, and George M. Hoffhein; that he believes the foregoing answer is true; that he has received his information from different defendants and other persons upon which his said belief is founded. Deponent further says the reason this answer is not verified by the said defendants is that they are neither in the county of Blue Earth, Minnesota, where deponent resides.

FRANKLIN H. WAITE.

Sworn & subscribed the 15th day of April, 1865, before—
[SEAL.] JOHN C. WISE,
Notary Public for Minnesota.

60 STATE OF MINNESOTA,
County of Blue Earth:

District court, sixth district.

THOMAS D. WARREN
against
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Van Brunt and Mary E. Van Brunt, minor heirs of George M. Van Brunt, deceased; John C. Wise, Isaac Marks, James McMurtrie, J. R. Brink, Marshall T. Comstock, James Van Blarcum, Mary J. Van Blarcum, George Culver, George M. Hofthein, Alfred M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John A. Willard, John Farrington, William J. Duley, William S. Sargent, Christiana Faatz, John H. Ray, and Asa White.

The plaintiff, for reply to the answer of the defendants, says that he denies that the plaintiff and said George M. Van Brunt, when they together took possession of the land in complaint described, intended to pre-empt a half section of land or any of it, but there being then no law allowing pre-emptions in Minnesota, they took possession intending to enter the same as Congress land, and then divide the same between them; and plaintiff avers that said G. M. Van Brunt first
61 claimed the whole disputed tract, and that since the patent issued therefor to his heirs, they have sold and converted to their own use all the most valuable of the land on plaintiff's side of the division line. The plaintiff also denies that they afterwards divided the same by a line where they supposed the survey-line would come, and he says that said line, though it cannot probably be accurately traced at this time, yet when the Government lines were run, the division line nearly equally divided the said disputed forty acres between them. The plaintiff positively denies that he ever intended that said George M. Van Brunt should pre-empt said disputed forty acres, and the plaintiff, by way of denial, says that said George M. Van Brunt released and assigned to the plaintiff all the improvements that had at that time been made by them or either of them on said forty acres, and all the interest and right of possession of said Van Brunt in and to that part of said forty acres which lay northeasterly of said division line; and that the plaintiff himself and at his own expense made alone all the said improvements on said forty acres (other than the said house)
62 which had been made on said forty acres up to the time he so bought out said Van Brunt. The only improvements that had been made on said forty acres at the time plaintiff bought out said Van Brunt was the house and two or three acres of breaking made at the sole expense of plaintiff, and substantially all of this breaking, if not the entirety of it, was on the part allotted as aforesaid to the plaintiff, and this breaking and the house were all the improvements on the same at this time, no fences having been made.

The plaintiff denies that Van Brunt, immediately after he was evicted from said house, built another house, and denies giving consent or having anything to do with his occupying an old shanty that had been

built on another forty acres by some other party, or of the building of said Van Brunt afterwards of another shanty on disputed forty acres.

The plaintiff positively denies that said Van Brunt made or assisted in making any improvements on said disputed forty acres, except said house, before said agreement for sale to plaintiff, on either side of said division line, and plaintiff denies that said division line gave to
63 said Van Brunt any part of the land afterwards pre-empted by plaintiff; and the plaintiff prays, in addition to the prayer of original complaint, that, in case the court should not find for the plaintiff that he is entitled to a decree for the release of the whole disputed forty acres, that then the court may ascertain how the said alleged division line divides said forty acres, and the defendants, on terms of payment of the original cost of the same, be decreed to convey so much thereof as may be found to have been assigned to him, to the plaintiff, and for other proper relief.

FINCH & PITCHER,
Att'ys for Plaintiff.

COUNTY OF BLUE EARTH, *ss:*

Thomas D. Warren, being duly sworn, deposes and says that he has read the foregoing reply, and that the same is true, of his own knowledge, except in regard to matters therein stated upon information and belief, and in regard to those matters he believes it to be true.

T. D. WARREN.

Subscribed and sworn to before me this 12th day of May, 1865.
[SEAL.] Z. PADDOCK,
Clerk of District Court.

64 STATE OF MINNESOTA,
County of Blue Earth:

District court, sixth judicial district.

THOMAS D. WARREN
against
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Van Brunt, and Mary E. Van Brunt, minor heirs of George M. Van Brunt, deceased; John C. Wise, Isaac Marks, James McMurtrie, J. R. Brink, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John A. Willard, John Farrington, William J. Duley, William S. Sargent, Christiana Faatz, John H. Ray, and Asa White.

This action, being at issue on the pleadings, came up for trial in its order on the calendar at the last general term of the court held at Mankato, in and for Blue Earth County, commencing on the fifth day of December, 1865. A trial by jury was waived by consent of the parties, and the action tried by the court. After due consideration of the proofs offered by the parties and received by the court, and after the argu-

ments of counsel, the court finds the facts at issue in the pleadings
65 and established by the proofs in the case as follows, namely:

1st. This controversy relates to the southeast quarter of the northeast quarter of section 13, in town. 108 north, of range 27 west, in the county of Blue Earth.

2d. That, by the admission of counsel in open court on the trial, both the plaintiff and George M. Van Brunt were, at the time of the contest over the premises in question in the U. S. Land-Office, legally qualified to pre-empt Government land under the provisions of the pre-emption laws of the United States.

3rd. In May, 1853, before the Government survey was made in the vicinity of the disputed premises, the plaintiff and George M. Van Brunt came to the county of Blue Earth, and selected about 280 acres of land, being the same which they afterwards pre-empted of which the disputed 40 acres constituted a part. They jointly and equally furnished materials and labor, and erected a house thereon, near the east line of the 40 acres in controversy, and both moved their families into it on the day of June, of the same year. Before they built the house
they broke up some two or three acres of land near the house
66 and planted it to crops, the last of May or fore part of June. They entered upon a joint occupancy of said 280 acres. On the 18th day of July, (same year,) it seems a difficulty arose between them, and they agreed on a division of their claims and executed the following agreement in writing, to wit:

TERRITORY OF MINNESOTA,
County of Blue Earth, ss:

This agreement, entered into this eighteenth day of July, anno Domini eighteen hundred and fifty-three, between T. D. Warren and George M. Van Brunt, of the county and Territory aforesaid, witnesseth: That, whereas the said T. D. Warren and George M. Van Brunt are in the use and occupation of two hundred and eighty acres of land, more or less, in the county and Territory aforesaid, by virtue of actual settlement thereon; and whereas a residence has been erected upon the said premises by the parties to this agreement conjointly; and whereas the said parties are anxious to divide the said land, reference being had to
the value of the residence thereon: Now, therefore, the said T. D.
67 Warren and George M. Van Brunt do agree to divide the said land in the manner following, to wit, beginning at the centre point of a line which is the southern east and west boundary of the land occupied conjointly by the parties to this agreement at the time of this agreement, and running from thence in a northwardly direction until it intersects the centre of a line drawn parallel to the northern east and west boundary of said land, now occupied conjointly as aforesaid, at the distance of eighty rods from the said northern, east, and west boundary as aforesaid; then running from thence in a northwestwardly direction through an iron-wood tree until it intersects the said northern east and west boundary as aforesaid. It is hereby agreed by and between the parties to this agreement that the said George M. Van Brunt shall have sole and exclusive possession and use of the land lying upon the west side of the dividing line above mentioned in this agreement; and that the said T. D. Warren shall have sole and exclusive use and possession of the land lying upon the eastern side of the line above mentioned, with the exception of the residence, the agreement to which
is hereinafter provided for.

68 It is hereby agreed, in relation to the residence which is now

upon that portion of the land which is assigned by this agreement to the said T. D. Warren, that the said George M. Van Brunt shall have sole and exclusive use and possession of the said residence until the first (1st) day of May, eighteen hundred and fifty-four, (1854,) when, upon the payment by the said T. D. Warren to the said Van Brunt of one-half the actual cost of said residence aforementioned, independent of the labor of said Warren and Van Brunt, the said Van Brunt shall give sole and exclusive use and possession of the residence hereinmentioned to the said Warren.

It is also hereby further agreed between the parties to this agreement that if the said Warren shall not be able to pay the amount above mentioned on the 1st day of May, 1854, aforesaid, that, at any time thereafter, upon payment of the amount aforesaid, *that* the said George M. Van Brunt shall give unto the said T. D. Warren the sole and exclusive use and possession of the residence herein mentioned.

It is also hereby further agreed between the parties to this agreement
that the said Van Brunt shall pay for that portion of the plow-
69 ing which has been done upon that portion of the land which
has been assigned to him by this agreement, and that the said Warren shall pay for that portion of the plowing which has been done upon that portion of the land which has been assigned to him by this agreement. It is also hereby declared that Mr. Maxfield and Mr. Hannah were witnesses to the division of the above-mentioned property.

In witness of which we hereunto subscribe our names and affix our seals the day and year first herein written.

T. D. WARREN. [SEAL.]
GEORGE M. VAN BRUNT. [SEAL.]

Signed & sealed in presence of—
J. Q. ADAMS.

4th. I find that the said agreed division line established by the plaintiff and said Van Brunt, and mentioned in said agreement, commenced on the forty-acre tract next east of the disputed line at a point ten (10) rods north of the south line of the said forty-acre tract and ran thence northwesterly at such a bearing and in such a direction as to cross and intersect the east boundary line of the disputed forty acres, the township line, as the same was afterwards located by the Government
survey of said land, and the adjacent Government subdivision,
70 at a point fifteen (15) rods from the southeast corner of the disputed forty acres; thence to a point six (6) rods due west from the northwest corner of the dwelling-house designated in said contract as a "residence," and now commonly known as the Brink house; and thence in a direct line (was in its entire extension to be and constitute a straight line) to the point of intersection with the then north boundary line of the claims of said parties and now the north boundary line of said disputed forty-acre tract; that the said agreed line passed through and across the plowing or breaking mentioned in said agreement dividing the same between the parties, so as to leave something more than half thereof on the plaintiff's side of said line.

5th. The cost of the "residence" or house mentioned in the foregoing agreement was, at a time subsequent to the execution thereof, settled and agreed upon between the parties thereto at two hundred and sixteen dollars, ($216,) exclusive of the labor of the parties therein, and one-half thereof paid by the plaintiff to said Van Brunt pursuant to said agreement. The one hundred and eight dollars paid by the

71 plaintiff as aforesaid was paid in two separate installments, the first of $58, and the last of $50, and, on the payment of the latter, Van Brunt executed and delivered a receipt to the plaintiff in the words and figures following, to wit:

"MANKATO, M. T., *Febr. 4th*, 1854.

"Rec'd, of Thomas D. Warren, fifty ($50,) in full of all demands up to this date. Also, all dues arising, or which may become due, upon a written agreement which is in possession of George Maxfield, made and entered into between Thomas D. Warren and George Van Brunt, wherein the said Thomas D. Warren was to pay to the said George Van Brunt, for labor and materials which he had expended in the erection of a house now occupied by the said Van Brunt; and this receipt is in full for any dues which would have become due by virtue of said written agreement, or any other demands.

"Witness my hand and seal the day and year above written.

"GEORGE VAN BRUNT. [SEAL.]

"In presence of—

"GEORGE MAXFIELD."

6th. That the agreement in the said receipt mentioned is the agreement above set forth; that, directly after the execution of said agreement, the plaintiff moved out of said house with his family, leav-
72 ing the said Van Brunt the occupancy and possession thereof pursuant to said contract, the plaintiff moving into and for a time residing with his family in a house on the town site of Mankato, and on no part of said 280 acres; that, soon after and within a reasonable time, he proceeded to erect a dwelling-house upon another portion of the land claimed by him, and of which the disputed forty acres was a part, and did complete these said last-mentioned house that fall, when he moved into the same with his family. This house was in the adjoining township, but upon the 160 acres then claimed by him, including the 40 acres in dispute, and 120 acres of which claim he subsequently pre-empted; that the plaintiff in the mean time continued in the sole and exclusive possession of so much of the said breaking, crops, and improvements on the now disputed premises as was on his the easterly side of said agreed division line, without objection on the part of said Van Brunt, who then well knew the fact of said possession by the plaintiff; that said Van Brunt recognized and treated said agreed line as the rightful line of division between his claim and that of the
73 plaintiff; that he plowed and cultivated thereto on his side thereof, and not on the other, and pointed the same out as the division line between said claims subsequent to the spring of 1855.

7th. That, on the refusal of Van Brunt to move out of the said house in May, 1854, as he had agreed to do, the plaintiff instituted legal proceedings against him, and ousted him from the premises; and that the plaintiff, by himself or by his tenants, has remained in possession ever since. And upon the said Van Brunt being so ejected from said house, (the Brink house,) he, said Van Brunt, moved into an old claim-shanty, which had been abandoned by some third party, situate on a part of his claim, and being on a 40 adjoining the disputed one, and lived there from two to four weeks, by which time he had erected another house on the disputed 40, and near the west line thereof, into which he moved his family, and there lived until he died, on the 5th day of January, 1856, and his family continued to live there until after the land was pre-empted; that Van Brunt, in 1853 or 1854, broke up somewheres

about twenty acres, about seventeen of which were on the disputed
74 forty acres, and the balance of such breaking on his claim and adjoining such forty. In 1854 or in 1855 he broke up a few acres more on and adjoining the disputed premises, and cultivated the land before broken. In 1855 he completed a fence around his entire improvements, being 200 to 300 rods. He made also about 80 rods of ditching, 15 or 20 of which was on the disputed 40 acres. His house was then completed; also, a large corn-crib, cow-shed, and other out-buildings, all of which are situated on said disputed forty acres.

8th. That, immediately upon Van Brunt's being ejected from the Brink house, as aforesaid, the plaintiff with his family moved into it, and there resided until some time in the fall of 1854, when he moved from said house into the dwelling-house erected by him on the 40 acres next east of the disputed 40 acres, where he resided with his family until after his pre-emption mentioned in the pleadings.

9th. From and after the time the plaintiff moved off the disputed forty acres, as last aforesaid, into the house last-mentioned, he, by himself or his tenants, continued the occupancy and improvements of that part of the original plowing which lay on his side of the said
75 agreed division line, and made other improvements in fencing, plowing, and tilling the land on the same side of said line, up to the time of his pre-emption.

10th. That the Government survey of the township lines through the public lands embracing the claims of the parties to said agreement, and including the 40 acres in dispute, was made in the fall of 1854, of the subdivision line in the spring of 1855. That, at the time the township lines were run, the plaintiff was in possession of and residing personally in the said original house with his family. That, at the time, the plaintiff's improvements on the disputed premises, including said house, were equal, if not greater in value, than those which Van Brunt had made or owned on said premises. That said Van Brunt, in his declaratory statement, filed in the land-office July 19th, 1855, as stated in the answer, dated his settlement on his claim, including the land in question, on the 4th day of May, 1855. And I find that the dwelling-house described in the proofs made by her witnesses at the land-office, at the time his administratrix pre-empted the said lands, is the dwelling-house
76 mentioned in the seventh section of the findings of facts in this order, as the house erected in June, 1854, and in which the said Van Brunt died in January, 1856.

11th. That the plaintiff made a tender of the purchase-money, and interest thereon, of this 40 acres, to the guardian of the minor heirs of Van Brunt, before the commencement of this action, and demanded a deed therefor, which was refused.

12th. On the trial of this cause it was stipulated, that copies from the General Land-Office of the evidence taken before the land-office by appellant and contestant, and of the written decisions of the land-officers, including the decision of the Secretary of the Interior, were admitted and introduced in the evidence on the trial of this cause, to establish what were then proved and decided.

13th. That the defendants John C. Wise, Isaac Marks, William S. Sargent, Asa White, Mary Jane Van Blarcum, James McMurtrie, John A. Willard, J. R. Brink, Sheldon F. Barney, and Marshall T. Comstock, and each of them, and the said White and Marks jointly, have
77 purchased the several lots and parcels of the said lands described in their joint and several answers in this action, and now hold the legal title thereto, and that they, and each of them, purchased the

several lots and pieces to them severally conveyed for a good and adequate consideration. I further find that they, the said defendants, and each of them, previous to their said purchases or payment of any consideration thereon, had knowledge or information of the grounds of the plaintiff's claim to the land in controversy, and notice that the sale of said lots, or any part of said disputed premises, was objected to and forbidden by the plaintiff, and that he claimed the title thereto adversely to all other parties. I also find that all intermediate parties, between the heirs of the said George M. Van Brunt and the said defendants and each of them, grantors and grantees, each and all of them, had such knowledge and notice before the purchase of any of said lots or lands by them, or either of them, or the payment of any consideration thereon by them, or either of them, save and except that Arza B. Barney, to whom the said Sheldon F. Barney conveyed the said lot,
78 by him purchased at a guardian sale of said lands, and who reconveyed the said lot to the said Sheldon F. Barney, had no such knowledge or notice; and, except, further, that the defendant Freeman O. Webster, from whom the defendant Marks purchased the two lots by him conveyed to the defendant John A. Willard, had only the notice aforesaid, but not the knowledge or information of the grounds of the plaintiff's claim to the disputed premises. And I further find that the said defendants Wise and Willard had notice, before their said purchases, that the plaintiff intended, or had declared his intention, to commence suit to recover said contested premises.

14th. That the defendants James Van Blarcum, Allen M. Collins, and Freeman O. Webster, before their several purchases, had notice that the plaintiff claimed to own the premises of which the lots by them purchased constituted a part, and that he specifically forbade the sale or conveyance of the same to any one; and that they purchased immediately after receiving such notice.

15th. I further find that the defendants George Culver, John Farrington, Christiana Faatz, John H. Ray, William J. Duly, George Becker, and George M. Hoffhein, had no knowledge or notice of
79 the plaintiff's previous equities in said premises, nor notice of his claims thereto, before their several purchases of the lots or parcels of said premises to them conveyed, or the payment of the purchase-money therefor.

16th. I also find that the lots or parcels of said disputed premises purchased by and conveyed to the defendants James McMurtrie are described as follows, viz: Lots 1, 2, 6, 8, 9, 10, 11, 12, 13, 19, 20, 23, 24, 25, & 26, 27, 34, 35, & 36, according to a map or plat on record in the office of the judge of probate of said Blue Earth County, in book I, ("A") of the minutes of said court, on page 94 thereof. And to the defendant J. R. Brink, lots 4 and 5, according to the same plat or map. And to the defendant Marshal T. Comstock, lots one, seven, and twenty-five, according to the said plat or map, and also lots one and two, in block eight, according to another plat also recorded in the office of said judge of probate, and recorded on page 161 of said book of minutes, and admitted by the parties to cover the same lands covered by the plat, recorded on page 94 of said minutes.

17th. I also find that the said Brink resides in the original house known as the Brink house; that he moved into the same in No-
80 vember, 1858, as the tenant of the plaintiff; that he then received the key to said house from the plaintiff, and agreed with the plaintiff to hold possession of said house, as such tenant, and to surrender said key up to the plaintiff whenever he, said defendant, should quit said house. That he has continued to reside therein ever since, and has

never surrendered said key nor the possession of the premises to the plaintiff. I also find that the said lots four and five, purchased by said Brink as aforesaid, lie and are situated on the easterly side of the said agreed division line. And I find no other issue of facts sustained by the proofs in the case, and hence find all others not true; but the facts above found do not include those admitted by the pleadings.

As conditions of law, I find:

1st. That the contest in the Land-Office and Department of the Interior between the claimants to the disputed premises, and the decision of the officers of said Office and Department, are not final or conclusive of the rights of the parties to said contest, the right of property of the parties being involved; but I do find that the party aggrieved by such decision can legally resort to a court of equity to have a
81 redress of his grievances and a correction of mistakes, errors, or frauds of the said officers to this prejudice.

2d. That this court has full and complete jurisdiction of the subject-matter in controversy, and to correct errors of law or of fact committed by the said officers to the prejudice of the plaintiff in their decision as to his rights to the land in question, and their disposition of the same.

3rd. That the legal title to said premises was properly and legally awarded to the heirs of the said George M. Van Brunt, and the patent for the same was properly and legally issued to them by said officers, subject however, to the trust hereinafter specified, as they could not divide a 40-acre subdivision between the parties, nor issue the patent therefor to them jointly, under the pre-emption laws of the United States and the rules and regulations of the Land Department, made in pursuance thereof, applying to the lands in question, notwithstanding the plaintiff and the heirs of said Van Brunt jointly held the equitable title to said subdivision, or severally to parts thereof.

4th. But I find that the said heirs took the legal title to so much of the disputed premises as lie on the plaintiff's (the easterly) side of
82 the said agreed division line established by the plaintiff and the said George M. Van Brunt as found, declared, and described in this order, to the use and benefit of the said plaintiff, his heirs and assigns. That the equitable title thereto is in the plaintiff, and has been in him exclusively since the establishment of the said agreed line, and the execution and delivery of said agreement. Hence I find that the plaintiff is entitled to a conveyance of the legal title to the said part and portion of said disputed premises from the heirs of the said George M. Van Brunt, and from such of their assigns owning any lot or parcel thereof as are not entitled in the law to be protected in their purchases as bona-fide purchasers for a valuable consideration.

And I find, further, that the information, knowledge, or notice of the plaintiff's previous equities in said premises, or of his rights therein, was sufficient, in the law and equity, to put each and every defendant to this action, and his several grantors and assignors, upon inquiry, and to make him and them chargeable in equity, with full notice,
83 and not entitled to be considered a bona-fide purchaser or purchasers for a valuable consideration, save and except the following-named defendants, to wit: George Culver, John Farrington, Christiana Faatz, John H. Ray, William J. Duley, George Becker, George M. Hofthein, and Sheldon F. Barney.

It is therefore ordered that the plaintiff have judgment and decree accordingly.

Done in vacation this thirtieth day of March, 1866.

HORACE AUSTIN,
Judge District Court, 6th Judicial District.

STATE OF MINNESOTA,
County of Blue Earth:

In district court, sixth district.

THOMAS D. WARREN
against
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Van Brunt and Mary E. Van Brunt, minor heirs of George M. Van Brunt, deceased; John C. Wise, Isaac Marks, James McMurtrie, J. R. Brink, Marshall T. Comstock, James Van Blarcum, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John A. Willard, John Farrington,
84 William J. Duley, William S. Sargent, Christiana Faatz, John H. Ray, and Asa White.

And now comes the plaintiff for judgment in this case; and thereupon, in pursuance of the decision heretofore filed herein—(and it appearing to the court that Henrietta E. Van Brunt, who was a minor and unmarried at the time of the commencement of this suit, has since arrived at full age, and has intermarried with Anson T. Foster, who now, by a stipulation of all the parties, signed by the attorneys of the parties, and also by said Anson T. Foster, hereby enters his appearance and consent that all further proceedings be had the same as if he had been made a defendant immediately after his said marriage)—it is considered, adjudged, and decreed by the court that the plaintiff do recover of the defendants, Flora E. Van Brunt, and the said heirs at law of said George M. Van Brunt, J. R. Brink, John A. Willard, and William S. Sargent, that portion of the land in dispute, and its immediate possession, which, by the said decision, is awarded to the plaintiff, and which is described as follows, to wit: Beginning fifteen rods north of
85 the southeast corner of the southeast quarter of the northeast quarter of section thirteen, in township one hundred and eight north, of range twenty-seven west; on the township-line; thence north on said township-line sixty-five rods to the northeast corner of said forty-acre tract; thence west forty-seven rods and thirty-six hundre'ths of a rod; thence in a straight line to the beginning, containing, by estimation, nine acres and sixty-two hundre'ths of an acre, (except lot three in Van Brunt's addition to Mankato,) as appears by a map or plat on record in the office of the probate court, in book 1, of minutes of probate court, page 94, claimed by defendant S. F. Barney.

And it is hereby ordered and adjudged that the said defendants Flora E. Van Brunt and the said heirs at law of said George M. Van Brunt, J. R. Brink, John A. Willard, and William S. Sargent, and all the other defendants, except Culver and Farrington, claiming any interest in this land, do, within 30 days, execute and deliver to the clerk of this court for the plaintiff, a deed in fee-simple for the said premises; and that the plaintiff within the same time deposit with the said clerk twelve dollars and five cents, and interest thereon since the entry of said land, the original cost of said land for the defendants, to be by the clerk
86 aforesaid paid to said defendants, in such proportions as they may have, up to the commencement of this suit, held title to the

same, and in default of such conveyance, this judgment shall operate as such conveyance. Second, that as to the remainder of the said forty acres, and as to the other defendants, this suit is discontinued.

Done at the regular term this 24th day of May, 1866.

By the court:

HORACE AUSTIN,
Judge District Court, 6th Judicial District, Minn.

Entered this twenty-fourth of May, 1866, at 2 o'clock p. m.

Z. PADDOCK, *Clerk.*

STATE OF MINNESOTA,
In District Court:

County of Blue Earth, 6th district.

THOMAS D. WARREN
vs.
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Foster, (formerly Van Brunt,) Anson T. Foster,
87 her husband; and Mary E. Van Brunt, by Flora E. Van Brunt, her guardian—heirs of George M. Van Brunt, deceased; John C. Wise, IsaacMarks, James McMurtrie, J. R. Brink, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alfred M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John A. Willard, John Farrington, William J. Duley, William S. Sargent, Christiana Faatz, John H. Ray, and Asa White.

The issues in this action came on for trial before the honorable Horace Austin, judge of this district, also district court held at Mankato, in and for the county of Blue Earth, on the first Tuesday of December, in the year 1865.

A jury was waived by the parties, and the case submitted to the court for decision.

For the purpose of this appeal, the defendants except to and contest none of the findings of facts in the decision of the court filed in this action; but desire the following testimony, which does not appear in such finding, to be added to the case:

George Maxfield, a witness produced by the plaintiff, testifies, on
88 his cross-examination, that he never knew where the outside lines of Warren and Van Brunt's joint claims are, except on the east side; the line on that side came further into the village of Mankato than the final line of the Government survey fixed it.

L. G. M. Fletcher, a witness produced by the defendants, testified that he was a surveyor, and was acquainted with the township and section lines in the vicinity of Mankato, and that the map or plat made by him for Mr. Van Brunt is correct. The plat was then admitted in evidence, and is hereto annexed. He also testified that the pencil-marks north of the old road, and nearly parallel with it, represent the bluff dividing the dry and the wet land, and is 20 to 30 feet higher than the marsh land.

He should regard most of the wet land as waste land. Water stands upon it nearly the year round. The amount of the wet land on the disputed 40 is fourteen $\frac{64}{100}$ acres. The house built by Van Brunt and Warren in company is marked "Brink house" on the map, by points given by Marshall T. Comstock. Witness knows nothing of his own knowledge of the dividing line agreed upon by the plaintiff and Van Brunt.

(Here follows a copy of the finding and decision of the court, and filed with the clerk.)

89 (Endorsed as follows:)

In district court, county of Blue Earth. Thomas D. Warren vs. Flora E. Van Brunt et al.

GENTS: Take notice that the within is a copy of the case prepared on behalf of the defendants below named.

Yours, &c.,

F. H. WAITE,
Att'y for F. E. Van Brunt, H. E. Foster, and Anson F. Foster, her husband; M. E. Van Brunt, by her guardian ad litem, and J. R. Brink.
WILLARD & BARNEY,
Att'ys for Def'ts Willard & Sargent.

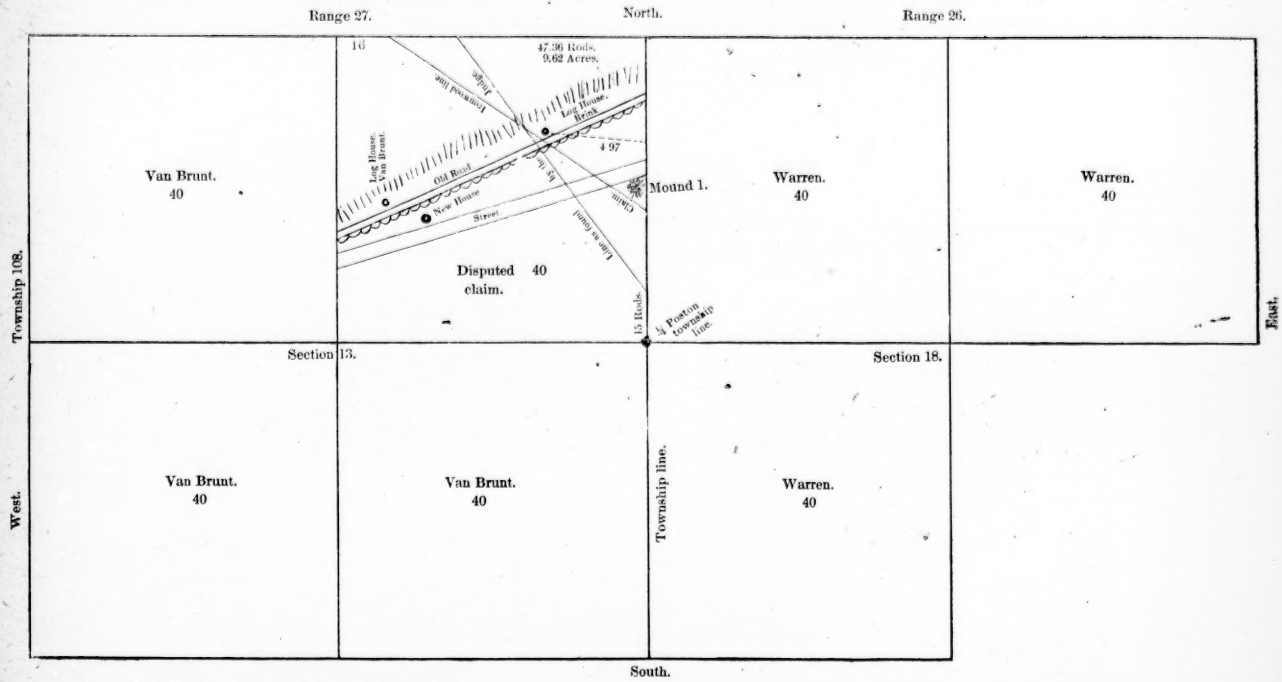
We admit service of a copy of the within case this 4th day of June, 1866.

FINCH & PITCHER,
Atty's for Pl'ff.

STATE OF MINNESOTA,
Supreme Court:

THOMAS D. WARREN, RESPONDENT,
against
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Foster, (formerly Van Brunt,) A. T. Foster, her
90 husband; and Mary E. Van Brunt, by Flora E. Van Brunt, her guardian—heirs of the said George M. Van Brunt, deceased; J. R. Brink, John A. Willard, and William S. Sargent, impleaded with John C. Wise, Isaac Marks, James McMurtrie, Marshall T. Comstock, James Van Blarcum, Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alvin M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John Farrington, William J. Duley, Christiana Faatz, John H. Ray, and Asa White, appellants.

No. 449. Warren vs. Van Brunt. Page 88.



No. of acres of dry land on disputed 40=25.36.
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STATE OF MINNES
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H. Ray, and Asa

STATE OF MINNESOTA,
Supreme Court:

THOMAS D. WARREN, APPELLANT,
against
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Foster, (formerly Van Brunt,) by Flora E. Van Brunt, her guardian—heirs of the said George M. Van Brunt, deceased; John C. Wise, Isaac Marks, James McMurtrie, Marshall T. Comstock, James Van Blarcum, & Mary Jane Van Blarcum, George Culver, George M. Hoffhein, Alvin M. Collins, Sheldon F. Barney, George Becker, Freeman O. Webster, John Farrington, William J. Duley, William S. Sargent, Christiana Faatz, John H. Ray, and Asa White, respondents.

91 In both of these appeals it is stipulated by the attorneys for the parties to the appeals on both sides, that the paper-book made in the case shall be received and used by both parties as the paper-book in each case.

It is further stipulated that the appeals are to be treated as follows: The defendants appealing from that part of the judgment below which is in favor of the plaintiff, and the plaintiff appealing from all those parts of the judgment in favor of the defendants, or any of them. It is also stipulated, that both the cases on appeal be put upon the calendar and notice of argument waived, and any objection to the notice of appeal and bonds being by the appellants together is waived, and that the clerk need make only one copy of the papers for the clerk of the supreme court for the two appeals.

Dated at Mankato, June 18th, 1866.

F. H. WAITE,
Att'y for several Def'ts.
WILLARD & BARNEY,
Atty's for several Defendants.
FINCH & PITCHER,
Atty's for Pl'ff.

92 STATE OF MINNESOTA,
County of Blue Earth:

I, Z. Paddock, clerk of the district court in and for said county, do hereby certify that I have compared the foregoing copies with the originals, complaint, and answer of defendants, reply, findings of court, judgment, notices of appeal, and stipulations by parties, and notices of appeal in the action therein entitled, and that it is a correct transcript therefrom and of the whole hereof, as the same remains of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 25th day of June, 1866.

[SEAL.]

Z. PADDOCK,
Clerk Dist. Court.

[5-cent revenue stamp, cancelled.]

93 STATE OF MINNESOTA,
Supreme Court:

THOMAS D. WARREN
vs.
FLORA E. VAN BRUNT ET AL.

By the court, (BERRY, J.:)

Both the letter and the spirit the pre-emption laws of the United States applicable to this case, (see act Sept. 4th, 1841,) and especially the oath prescribed to be taken by the settler, require that a pre-emption entry shall be made for the exclusive benefit of pre-emptor. This being so, no agreement entered into between Van Brunt and Warren prior to entry, whereby any part of the land to be pre-empted by either was to be shared by the other, could be enforced. As the pre-emption law does not permit a quarter quarter-section to be subdivided for the purposes of settlement or entry, or, in other words, as but one settler is recognized as having any pre-emption right to a given quarter quarter-section, the forty-acre tract in controversy in this action must have been subject to pre-emption by one of the parties, (Van Brunt or Warren,) or by neither. It could not be subject to pre-emption by both jointly as a whole, or severally in distinct parts. (See sec. 11, act Cong. Sept. 4, 1841; act Cong. Aug. 4, 1854.) No misconstruction of the pre-emption
94 law, no difficulty or impossibility of ascertaining the lines of the tract, no ignorance as to the lines of any adjoining or neighboring tract intended to be claimed and pre-empted by either of the parties; no hardship arising from the circumstances of a particular case; no agreement, express or implied; no acts or conduct of the parties to the contrary, would affect these propositions. Whoever was entitled to the legal title of the forty in this case, was entitled to the whole forty absolutely, and in his own exclusive right, and it would be simply impossible, under existing laws, that such title should be subject to any equities in the enforcement of which any portion of the forty in question must be awarded to another party. The court below finds conclusions of law to the effect that the legal title to the disputed forty, and the patent thereof, were properly awarded to the heirs of Van Brunt, but that they took and held such title to a portion of the forty subject to the use and benefit of Warren, in whom is the equitable title to such portion, and for which he is entitled to a conveyance. From the foregoing considerations it follows that these conclusions of law cannot be sustained; neither can the judgment by which such conclusions are sought to be carried into effect. The result of the judgment, if executed, would be to divide the contested forty between Warren and the represent-
95 atives in interest of Van Brunt. All parties are dissatisfied, and by appeal and cross-appeal the action comes to this court. As there is no case made, we have only in the first place to inquire whether the conclusions of law, upon which the judgment rests, are supported by the facts found. Having determined that the conclusions of law are not thus supported, we have in the second place to inquire what judgment should be rendered upon the facts found. The complaint charges that the pre-emption entry made by the representatives of Van Brunt, who had deceased, was obtained by fraud and corruption. This charge was found by the court below to be untrue. It is admitted in the pleading that, upon a notice given by Warren, a contest as to the right to the disputed forty was had before the local land-office, and that upon a disagreement between the register and receiver, the case was transmitted

to the Commissioner of the General Land-Office, who decided adversely to Warren and in favor of Van Brunt's representatives, and that upon an appeal by Warren to the Secretary of the Interior the decission of the Commissioner was affirmed. There was then no fraud or surprise, and the officers through and by whom the decision of the controversy was made, had, under the pre-emption law, jurisdiction of cases of this character, and the parties interested submitted themselves to such
96 jurisdiction by appearance. By section 11 of the act of Sept. 4, 1841, before refer'ed to, and entitled "An act to appropriate the proceeds of the sales of public lands, and to grant pre-emption rights," it is provided "that when two or more persons shall have settled on the same quarter-section of land, the right of pre-emption shall be in him or her who made the first settlement, provided such persons shall conform to the other provisions of this act; and all questions as to the right of pre-emption arising between different settlers, shall be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and a revision by the Secretary of the Treasury of the United States." By sect. 3, act March 3, 1849, the function of revision appears to have been transfer'ed to the Secretary of the Interior. Prior to the passage of an act of Congress entitled "An act to extend the right of pre-emption over unsurveyed lands in Minnesota, and for other purposes," approved Aug. 4, 1854, the pre-emption law of 1841 applied to Minnesota only to lands which had been surveyed. By the act of August 4, its provisions are extended to "land in Minnesota Territory, whether surveyed or not." Up to the 4th day of August, 1854, neither Van Brunt nor Warren possessed any rights recognized by *by* the United States to the land in question. Both were mere "squatters." The land at that time had
97 not been surveyed. On said 4th day of August both Van Brunt and Warren, with their families, were residing upon the disputed forty. The right of both had begun on that day, and whatever took place prior to this date is immaterial. Some time in the fall succeeding, Warren having erected a dwelling-house upon an adjoining forty, moved into it, and continued to reside therein until his pre-emption entry was made. Van Brunt continued to reside upon the disputed forty until his death, and his family continued to reside thereupon after his death, until the date of the pre-emption entry made by his widow and administratrix. The act of August 4, 1854, contained the following proviso: "Provided, however, that if when said lands are surveyed it is found that two or more persons are settled upon the same quarter section, each shall be allowed to enter his improvement as near as may be by legal subdivisions." "By legal subdivisions;" that is to say, in this case, by forties, no survey having been made so that persons making pre-emption settlements could ascertain upon what precise Gover'ment subdivision they would be found to have located; and, it being deemed advisable to provide for some fair adjustment of conflicting claims, the proviso above cited was intended to meet the case, and all parties who made pre-emption settlements upon unsurveyed lands in Minnesota made the same subject to this proviso, and, therefore,
98 subject to the risk of losing a part of the land claimed by them, if it should turn out, upon a survey, that such claim conflicted with that of a neighboring settler.

Under this state of the facts and the law it was for the Land Department of the General Government, subject to the revisory power of the Secretary of the Interior, to determine the rights of the contesting parties, not according to any notions of squatter justice, but according to

law, and in so doing they allow Van Brunt's administratrix to enter the land where he and his family actually resided, and where he appears to have made improvements to a considerable amount; and they permit Warren to enter the land on which his dwelling was situate, where he and his family resided. This was a fair adjustment of the controversy, under the law, and was in accordance with both the spirit and letter of the proviso of the act of August 4th, by which each part, in case of a conflict of this nature, was to "be permitted to enter his improvements as near as may be by legal subdivisions." Both parties could not have the forty; which should have it was the question to be decided. The very language of the proviso, "as near as may be by legal subdivisions," implies that cases would occur in which it would be neither practicable nor possible for each to enter the whole of his improvements by
99 legal subdivisions, and in such cases the exercise of a sound discretion was called for in the adjustment of the matter in difference with as much regard to the right of each to his improvements as the nature of the case would permit, provided, always, that the entry must be by legal subdivisions. We think the discretion was equitably exercised in this case, and the forty properly awarded to the administratrix of Van Brunt; and, as before stated, that Warren had no right, in law or equity, to any portion of the disputed forty-acre tract. Speaking for myself alone, it is perhaps proper for me to say that, while I have examined the facts of the case, I can see no very good reason why action of the Land Department should not be held conclusive. Here that Department had jurisdiction, the proceedings were not ex parte, and there was a continued contest between the local land-officers, the Commissioner, and the Secretary of the Interior. It is possible there may be something in the point made by the learned counsel for Warren, that the action of the Land Department cannot be final and conclusive, because that is not a tribunal which is or can be invested with judicial powers. At any rate, while it seems to have been held in some cases by the Supreme Court of the United States that, under circumstances analogous to those of the case at bar, the determination of the land-officers would be final, (as in Lythe vs. State of Arkansas, 9 How.,
100 333: See, however, the comments of Justice Catron on this case, in Barnard's Heirs vs. Ashley's Heirs, 18 How., 45, and by implication in Garland vs. Wynn. 20 How., 8, as well as in Lyndsey vs. Hawes, 2. Black 54,) it is said by Justice Nelson, in State of Minnesota vs. Batchelor, (1 Wall., 115,) that "a court of equity will look into the proceedings before the register and receiver, and even into those of the land-office, or other offices, where the right of property of the party is involved, and correct errors of law or of fact to his prejudice. The proceedings are ex parte and summary before these officers, and no notice is contemplated or provided for by pre-emption laws as to parties holding adverse interests, nor do they contemplate a litigation of a right between the applicant for a pre-emption claim with a third party. The question as contemplated is between the settler and the Government, and if a compliance with the conditions is shown to the satisfaction of the officers the patent certificate is granted." It will be seen that these views of the Supreme Court, as announced by Justice Nelson, do not confine the right of re-investigation by a court of equity to cases when fraud has been committed, and the land-officers imposed upon by false testimony or otherwise, or to cases where there has been no contest. Under this state of things I
101 have thought best, as before remarked, to examine the facts in the case at bar, the result of such examination being the same as if

the determination of the Land Department had been held conclusive. The judgment below must be reversed, and judgment be entered dismissing the suit as to all the defendants.

102 STATE OF MINNESOTA,
Supreme Court:

THOMAS D. WARREN, RESPONDENT,
vs.
FLORA E. VAN BRUNT, WIDOW OF GEORGE M. Van Brunt, deceased; Henrietta E. Foster (formerly Van Brunt) and A. T. Foster, her husband; and Mary E. Van Brunt, by Flora E. Van Brunt, her guardian—heirs of the said George M. Van Brunt, deceased; J. R. Brink, John A. Willard, and William S. Sargent, impleaded with John C. Wise et al., appellants.

July term, 1866. No. 20 c.

Pursuant to an order of this court made in this action and entered in the order-book of the court on this 18th day of January, A. D. 1867—

It is here and hereby determined and adjudged that the judgment heretofore had, entered, and appealed from herein, in the court below, to wit, in the district court of the sixth judicial district, sitting
103 within and for the county of Blue Earth, be, and the same hereby is, in all things reversed, and that this suit be, and hereby is, in all things dismissed as to all the defendants.

And it is hereby further determined and adjudged that the appellants above named do have and recover of the respondent herein, the said Thomas D. Warren, the sum and amount of thirty-three dollars and fifteen cents ($33.15) for their costs and disbursements in this action in this court, and that they do have execution for the enforcement hereof.

Dated and signed January 18th, A. D. 1867.

By the court.

Attest:

SHERWOOD HOUGH, *Clerk.*

STATE OF MINNESOTA,
Supreme Court, ss:

I, Sherwood Hough, clerk of the said supreme court, do hereby certify that the above and foregoing manuscript in writing, appearing on this and the preceding page of this sheet of legal-cap writing-paper,
104 is a true and correct copy and transcript of the entry of judgment in the cause therein entitled as the same appears entered and of record in the judgment-book of this court.

In witness whereof I have hereunto set my hand and affixed the seal of our said supreme court at the city of St. Paul this 18th day of January, A. D. 1867.

[SEAL.] SHERWOOD HOUGH, *Clerk.*

The foregoing papers attached together and endorsed "Judgment-roll. Filed January 18th, 1867. Sherwood Hough, clerk."

STATE OF MINNESOTA,
Supreme Court, ss :

I, Sherwood Hough, clerk of said court, do hereby certify that I have carefully compared the within and foregoing copy with the original record and judgment-roll in the within-entitled action, remaining on file and of record in my office, and that the same is a true and authentic transcript thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of our said supreme court, at the capitol, in the city of St. Paul, this 4th day of March, A. D. 1872.

[SEAL.] SHERWOOD HOUGH, *Clerk.*

[5-cent int. rev. stamp affixed and canceled.]

(Indorsed:) Supreme Court United States. Thomas D. Warren, pl'ff in error, vs. Flora E. Van Brunt et al., impleaded with others, def'ts in error. Return to writ of error. C. K. Davis, M. S. Wilkinson, & M. J. Severance, att'ys for pl'ff in error.

(Indorsement on cover:) No. 231. Thomas D. Warren, plaintiff in error, vs. Flora E. Van Brunt, widow of George M. Van Brunt, deceased, Henrietta E. Foster, et al. Minnesota sup. court. Filed 2nd November, 1872.

SUPREME COURT

OF THE

UNITED STATES

THOMAS D. WARREN, Plaintiff in Error,

vs.

FLORA. E. VAN BRUNT, *et al.*, Defendants in Error.

Nos. 230–231.

ARGUMENT FOR PLAINTIFF IN ERROR IN 230, 231.

M. S. Wilkinson and C. K. Davis, *Counsel for Plaintiff in Error.*

SAINT PAUL.
Ramaley & Cunningham, Book Printers,
1874.

Supreme Court of the United States.

THOMAS D. WARREN,
Plaintiff in Error,
vs.
FLORA E. VAN BRUNT, *et al.*
Defendants in Error.

TWO CASES.—Nos. 230, 231.

This controversy relates to the southeast quarter of the northeast quarter of sec. 13, town 108 north of range 27 west, in the county of Blue Earth, Minnesota.

The plaintiff in error brought this suit in equity, and prayed that the legal title of the defendants in error which is derived from George M. Van Brunt, deceased, who was the patentee, be declared to be held by them in trust for Warren and that the defendants convey to him.

The court of original instance declined to decree to Warren all the relief prayed, but it decreed in his favor as to a portion of the tract, being the allotment claimed to have been established by Warren and Van Brunt while they were in joint occupancy before the lands were surveyed by the United States. The tract so awarded is described in the decree of the district court and appears from the map in the record.

From this decree each party appealed to the Supreme Court of Minnesota, thereby making two records in that court. The Supreme Court reversed the judgment of the

district court, and denied Warren any relief both as to the whole tract and also as to that portion which the district court awarded to him, and dismissed the suit as to all the defendants.

As to these judgments of the Supreme Court of Minnesota Warren has sued out writs of error—upon the ground that his record shows that there were drawn in question in the courts below the construction of a statute of the United States and that the final decision and judgment of the Supreme Court of Minnesota are against the title, right, privilege and exemption specially set up and claimed by the plaintiff in error under such statute.

We shall therefore argue these cases together.

The district court found the facts and conclusion of law in form as prescribed by the Statutes of Minnesota, so fully that no case or bill of exceptions was necessary to present the points against which error is asserted.

The case is reported in 12 Minn. Rep. p 70.

The question in this case is, what is the correct legal deduction from the facts found by the district court.

These facts may be summarized as follows: In May, 1853, Warren and Van Brunt made a claim together of about 280 acres of land, being the same they afterwards pre-empted, of which the forty acres in dispute are part.

They, with their joint means and labor, put up a house on this forty acres, and, with both their families, moved into that house in June, 1853. They had previouslybroken two or three acres and planted the same.

Up to July 18, 1853, their occupancy was a joint one, but on that day, a dispute having arisen, they agreed in writing in substance, reciting that they are in the use and occupation of 280 acres of land in Blue Earth county, Territory of Min-Minnesota, by virtue of actual settlement and that a residence has been erected thereon by the parties conjointly,

and that they are anxious to divide the land, reference being had to the value of the residence; that a line shall be drawn through the land (the 280 acres); that Van Brunt shall have the sole and exclusive possession and use of the land lying west of said line, and Warren of the land lying upon the eastern side of the line. It is agreed in regard to the residence, which was on Warren's side of the line, that Van Brunt should occupy the same until May, 1854, when upon payment by W. to Van B. of half its cost Van B. should give sole and exclusive use and possession to W.

The Court then finds the *situs* of the dividing line. It finds that Warren made the last payment to Van Brunt of cost of house February 4, 1854. That directly after the execution of the agreement Warren moved out of the house leaving Van Brunt in possession pursuant to the contract. Warren moving into another house on no part of the 280 acres; that soon after, and in a reasonable time, Warner built a dwelling on the land claimed by him, and of which this forty was part, and in the fall moved into it with his family, and that he, in the meantime continued in the sole and exclusive possession of the breaking, improvement and crops on his side of the line with Van Brunt's knowledge and acquiesence; that Van Brunt did the same on his side the line. That on the refusal of Van Brunt move out in May, 1854, Warren ousted him by legal proceedings and by himself and his tenants has remainded in possession ever since. Van Brunt after this ouster moved into an abandoned claim shanty situate on a part of his claim but on a forty adjoining the one in dispute—lived there two or three weeks, and then moved back into a house which he had in the meantime erected on the disputed forty and near the west line thereof. He lived there until January, 1856, when he died. His family continued to live there until after the land was pre-empted. That in 1853 or 1854, Van Brunt broke about 17 acres on the disputed forty; in 1854 or 1855 he broke a few

acres more and cultivated the land before broken; in 1855 he completed a fence around his entire improvement; he also ditched on this 40 and put upon it various outbuildings.

Immediately upon the ejection of VanBrunt from the first house Warren moved into it with his family and there resided until sometime in the fall of 1854, when he moved from there into a dwelding built by him on the forty next east of the disputed forty, and from that time up to the time of the pre-emption was by himself or his tenants in the occupancy and improvement of that part of the forty acres in dispute, which lay on his side of the agreed division line, and made other improvements in fencing, plowing and tilling the land on the same side.

That the United States survey of township lines was made in the fall of 1854, and of the sub-division lines in the spring of 1855. When the township lines were run the plaintiff (Warren) was living with his family in the first house, and that at that time his improvements on the disputed forty were equal to if not greater than Van Brunt's.

Van Brunt filed a declaratory statement on July 19, 1855, and therein dated his settlement on his claim, including the lands in dispute, on June 4, 1855. The dwelling house described in proofs when administratrix entered the land was the dwelling house which Van Brunt erected after being ejected from the old house.

Contest before local officers March, 1856.

Decision of Commissioner of General Land Office, April 4, 1857.

Decision of Secretary of the Interior October 31, 1857.

Patent of the 160 acres issued to heir of George M. Van Brunt, deceased, May 15, 1860.

ASSIGNMENT OF ERROR.

First. The court erred in refusing to decree to Warren the entire tract.

Second. If this is not error, then it erred in not finding him entitled to an undivided half of the entire tract.

Third. Under any view, it should have affirmed the judgment of the district court, by which was awarded to Warren the allotment claimed to have been made to Warren, while they were in joint occupancy before the survey.

AS TO THE FIRST ASSIGNMENT OF ERROR.

I. The first inquiry in this case respects the import and effect of the written agreement which the court below, by its decision, has attempted to enforce and carry into effect between the parties:

1st. This agreement provided for a division of the *use and occupation* of certain lands to which neither party had title, but which both were at the time *using and occupying ;* and also for the permanent ownership of a certain residence or dwelling situate on said lands. There is no attempt by this agreement to transfer the title or estate of the lands. It is not perceived, therefore, that this agreement in anywise conflicts with public policy or law.

The agreement was valid and effectual so far as the residence or dwelling was concerned.

2d. But the agreement, so far as division of the use and occupation of the land was concerned, was and is inoperative, and effectual for nothing, because of the uncertainty of the description of the lands.

There are no surveys, no plats or maps, and no monuments, natural or artificial, referred to in the agreement, and none in fact existed. In truth, the lands themselves were neither sur-

veyed nor located, nor had they any certain or fixed or known or *ascertainable* boundaries. The agreement in this regard, therefore, had no elements of certainty, and could not be carried into effect, and was therefore inoperative and void.

3d. It is obvious that the subsequent government surveys, divisions and subdivisions mentioned in the pleadings, were never made and located so as to correspond with and cover the identical lands described or intended in the agreement.

An inspection of a sectional map, this agreement, and the fourth finding by the court will show this.

The fourth finding, as to the agreed division line, cannot be reconciled with the agreement, excepting on the assumption that the actual government survey located the sectional divisions and subdivisions differently from what was contemplating in the makingof the agreement. The identical 280 acres mentioned and intended in the agreement were, therefore, never included in the government surveys and des criptions set forth in the pleadings.

It therefore became impossible to carry out this agreement between the parties as to the division of the premises. Hence the agreement in this regard became inoperative and void.

4th. Not only did the execution of this agreement as to the division of the premises become impossible, as aforesaid, in the nature of things, but in point of fact it was so treated by both parties after the government survey, and its execution was never attempted, asserted or claimed by either party, and has never been attempted or claimed by either party to this day.

It is, therefore, respectfully submitted that an agreement impossible of execution by reason of the original uncertainty of its terms, and also by reason of subsequent events, and therefore subsequently disregarded and repudiated by both parties thereto, ought not and cannot rightfully or properly be revived and its enforcement attempted by a court.

II. The important remaining inquiry is: Which of the two parties has the best title in law and equity to the 40 acre parcel in controversy?

It is respectfully submitted that the solution of this question is embraced in a very small compass.

Both plaintiff and the deceased Van Brunt entered upon the premises in dispute at the same time and used and occupied them conjointly. They also had a "residence" or dwelling in common, on the premises. But afterward Van Brunt transferred his interest in this residence or dwelling to the plaintiff, and the latter became the sole owner and went into the sole use and occupation thereof. *Subsequently to this* (*See 7th and 8th findings*,) Van Brunt also erected a house on the 40 acre parcel in question and moved into it and continued thereafter to reside on the same. All this was done prior to the Government survey which, as to the township lines, took place in the fall of 1854, and as to the subdivision-lines, in the spring of 1855. (See finding 10th.)

The sole and exclusive residence and occupation of the plaintiff, on the premises in question, therefore has *in point of fact* a date *anterior* to that of Van Brunt.

The plaintiff in his declaritory statement, dated his settlement on the 17th day of November, A. D. 1853.

Van Brunt, in his declaratory statement, dated his settlement on the 4th day of June, A. D. 1855. (See 10th finding.)

The plaintiff's settlement, therefore, on the premises in dispute, both in point of fact, and as claimed by the parties respectively, was *anterior* in time to that of the deceased Van Brunt. As the settlements, respectively, were never afterwards abandoned or intermitted by either party, but so continued and existed at the time of the Government surveys and afterwards, it conclusively follows that the plaintiff had the prior and better right, both legal and equitable, to these premises, and to the Government patent thereof; and hence that

Van Brunt's legal representatives received the patent to these premises, in fraud of the plaintiff's right, and consequently now holds the title thereto in trust for him.

The proviso of Sec. 1 of the act of Congress of August 4, A. D. 1854, 10 *Stat.* 576, *Brightley's Dig. p.* 477, § 108, extending the pre-emption act of 1841 to Minnesota, does not reach the case at bar, for the reason that both the plaintiff and Van Brunt had their dwelling on the smallest *legal subdivision.* We must then fall back on other provisions of the act of 1841. Sec. 11, of this act, gives the right of pre-emption, where two or more persons have settled on the same quarter section, to him who made the *first settlement.*

5, *Stat.* 455.

Brightley's Dig. p. 473, § 84.

It is true that in the first instance the plaintiff and Van Brunt made a joint and contemporaneous settlement on this parcel; but subsequently Van Brunt transferred his right in the joint residence to the plaintiff, and left it to the plaintiff's sole use and occupation, and afterwards erected himself another dwelling on the same parcel. Under this state of facts Van Brunt could in no event claim for his settlement a date *anterior* to the erection and occupation of this last named dwelling house, which was at least (as found by the Court) from two to four weeks *later* than the commencement of the plaintiff's sole and exclusive occupation of the first residence, after Van Brunt left it under the agreement.

Thus, counting the joint occupation as nothing, the plaintiff's settlement on this parcel was plainly *anterior* to that of Van Brunt. But no reason is perceived why the plaintiff was not entitled to date his own settlement from the commencement of the *joint* settlement, inasmuch as Van Brunt voluntarily sold, transferred and surrendered his interest and right in the joint residence to the plaintiff. But after such transfer and surrender it is very plain Van Brunt would not be entitled

to claim the commencement of the *joint settlement* as the beginning of his own. And his declaratory statement shows that he did not so claim.

It may be here remarked that the residence of Van Brunt, on a parcel which he was not entitled to pre-empt, worked him no injustice or hardship, but his case was fully provided for by the statutes. He could have pre-empted his entire 160 acres, notwithstanding his residence on this parcel and exclusively of it. See act of Congress, 3d March, 1843, Sec. 7 and 8. 5 Stat. 620.

Brightley's Dig. p. 475, § 95 *and* 96.

Also act of Congress, 22d of June, 1838, *Sec.* 1, 5 *Stat.* 251.

Brightley's Dig. p. 477, § 76, *and act of Congress of* 1840, *Sec.* 1, 5 *Stat.* 382.

Brightley's Dig. p. 472, § 78.

It is then clear that both in law and equity the plaintiff was entitled to receive from the Government the patent for the parcel of land in question.

III Was the decision of the Land Office Department *conclusive and final* between the parties in this matter?

It is respectfully submitted that this can hardly be treated now as an open question. But if it could its solution on principle is so clear and obvious as hardly to occasion difficulty.

The constitution of the United States declares plainly where all judicial power shall be vested. *Art.* 3, *Sect.* 1.

It is not competent for Congress to vest judicial power in the land department of the government, nor in any officer of such department, nor in any officer connected with the executive department of government. Congress, therefore, could not if it would, vest any land officer with power to *adjudicate* the rights of the parties to this suit.

Congress, however, could and did designate certain officers to represent the government, and on its behalf and for the

guidance of its own executive conduct, to determine between the conflicting claims of opposing claimants. But the decisions of such officers are not *adjudications*, but simply the practical resolves of an executive who is compelled to act, and to that end must decide upon his course or line of conduct or particular act. Like any other act of an executive, or any other person or party, the decision is binding as such on the government or person or party who makes it. But in no sense can such a decision be regarded as an *adjudication* of the rights of the opposing claimants. It, in fact, is and can be no *adjudication* at all. It is simply a decision of the executive branch of government for the goverance of its own action. The legal and equitable rights of the parties between themselves are in nowise determined or concluded by such decision.

But this question is sufficiently settled by the cases—

Lindsey vs. Howes, 2 *Black.*, 554, *and* AUTHORITIES THERE CITED.

The conflicting claims of the parties to this suit, to the premises in question, are therefore properly before this Court for adjudication.

IV. It is not perceived that there is any basis whatever for the claim of Van Brunt to the *whole* of the disputed 40 acres. The defendants in this suit distinctly and ostentatiously repudiate the written agreement. Had they insisted on the binding effect of this agreement, they might perhaps demand the affirmance of the decision of the court below dividing the disputed premises according to the agreement. But on what principle they could ask more than this is not perceived; for there is no way of marshaling the evidence so as to make it speak a date of settlement for Van Brunt *anterior* to that of the plaintiff.

The most that the defendants could by possibility claim is to date Van Brunt's settlement from the commencement of the *joint settlement*, thus putting him on an *equality* with the

plaintiff in point of the time of the commencement of their settlements respectively.

Then by insisting upon the force of the agreement as well as the equality of the parties in their settlement and occupation of the disputed parcel, the defendants would have some basis whereon to stand in asking the affirmance of the decision of the court below.

But in the attitude in which the defendants now present themselves before this court, it is respectfully submitted that there is absolutely no ground, whatever, under them.

V. It appears from the findings of the court that the plaintiff has always been in possession of the disputed premises by the occupation of the original residence or dwelling, either by himself or tenants.

Possession is notice to the world and was notice in this case to *all* the defendants, not only of the plaintiff's claim to these premises, but of the extent and nature of his claim. This rule is too trite to require the citation of authorities.

In view of the foregoing considerations it is submitted that the plaintiff is entitled to the entire relief demanded in his complaint.

AS TO THE SECOND ASSIGNMENT OF ERROR.

If the foregoing views are incorrect, then Warren is entitled to an undivided half of this tract.

A joint entry of the disputed forty should have been allowed by the Land Department in settlement of this dispute; the department having failed to permit this, the Court should have decreed the title under the Van Brunt patent to be subject to a trust in favor of Warren for the undivided half.

There is nothing in the pre-emption laws which forbids persons from making a joint settlement, declaration and purchase.

The act of Aug. 4, 1854, 10 Stat. 576, (1 Brightley, 477,) which allowed settlement on unsurveyed lands in Minnesota, provides that when two or more persons have settled upon the same quarter section, each shall be permitted to enter his improvement, as near as may be, by legal subdivisions.

This is all very well so far as it goes, but it manifestly fails to provide for such a case as this, where both claimants' improvements are upon the same forty acres. And this difficulty has been practically presented to the Secretary of the Interior and determined by him.

On January 8, 1858, in the case of *Laughton v. Caldwell* (*Vol.* 1, *p.* 387, *Lester's Land Laws, Nos.* 430, 431,) which was brought from Minnesota, before the Secretary of the Interior he says: "I am of the opinion that under the act of August 4, 1854, extending the right of pre-emption to unsurveyed "lands in Minnesota, which provides that 'if when said lands "'are surveyed, it is found that two or more persons have "'settled upon the same quarter section, each shall be per-"'mitted to enter his improvements, as near as may be, by "'legal sub-divisions. The said parties, Laughton and Cald-"'well, should each be permitted to enter one forty acre sub-"'divison of the tract in dispute, if such a division thereof "'can be made, or to give to each his principal improvements; "'otherwise, unless the parties can agree upon a more satis-"'factory mode of division, exact justice would seem to "'require that they be allowed to enter jointly the whole half "'quarter section in dispute; and, in addition, each may be "'allowed to enter the contiguous uncultivated tracts claimed "'by him.'"

In the history of the case last cited, it appears that one of the parties refused to make either a selection or a joint entry, and the Secretary then held that the other party might enter whichever of the disputed subdivision he might designate.

The case of *Rooser v. Schepp* came up from Kansas before

the Secretary, in 1859. (Vol. 1, Lester's Land Laws, p. 393, No. 440.) The dispute was about an eighty upon which both settled prior to the survey, and the Secretary applied the same principle.

See also Vol. 1, Lester's Land Laws, p. 415, No. 472.

It may be possible, in view of the agreement made by the parties, and their continuous observance of that agreement up to the time when Van Brunt repudiated it by filing for the whole tract at the local land office on July 19, 1855, (Warren not having filed until Dec. 24, 1855,) that the court will adopt the views of the district judge, in case that court should conclude that it has the right to do equity in this matter.

But if this agreement is to be treated as a nullity, or if the heirs of Van Brunt are held to have estopped themselves from claiming under it because of their attempt to prove for and obtain the whole forty, (and they seem to have put themselves in this predicament,) we think there should have been a joint entry allowed.

Nor are joint entries against the policy of the legislature on this subject in analogous cases.

See Sect. 8, *Act March* 3, 1843, 5 *Stat. p.* 621.

Also Sect. 1, *Act June* 22, 1838, 5 *Stat .p.* 251.

AS TO THIRD ERROR ALSIGNED.

The District Court declined to decree the whole tract to Warren, or an undivided interest therein. It asserted the agreement made by the parties before the lands were surveyed, and adjudged the plaintiff in error to be entitled to his share of that allotment.

We maintain that this ruling is incorrect, for the reason that Van Brunt inaugurated this controversy, by disavowing the agreement, and instituting proceedings before the local land officers for the whole tract, and basing his claim upon

the theory that Warren had no interest whatever in the property.

About five months after this proceeding was begun by Van Brunt, Warren filed for the whole tract in resistance to the exclusive claim thus asserted by Van Brunt. The conflict here made brought out all of the history of this case before the Department of the Interior, and in the courts from whose decisions this writ of error is taken.

But if the reason which we have given for the incorrectness of this decision is not valid, and if there are no other reasons for its invalidity, the very least that Warren is entitled to is to have the validity of that agreement sustained.

It will be seen by reference to that portion of this argument in which the decisions of the Department are quoted, that the alternative was allowed to the parties in those cases either to agree on a division or to enter jointly.

The judgment should be reversed.

M. S. WILKINSON,
C. K. DAVIS,
Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

THOMAS D. WARREN, *Plaintiff in Error*,
vs.
FLORA E. VAN BRUNT *et al.*
No. 230.

BRIEF FOR DEFENDANTS IN ERROR

This cause comes up by writ of error to the Supreme Court of the State of Minnesota under the 25th section of the judiciary act.

Pleadings.

On the 7th of August, 1864, the plaintiff in error brought a suit in the district court of the 6th judicial district of the State of Minnesota, by filing a complaint in the form of a bill in equity and making this case: that he, the plaintiff, in 1853, settled upon and improved a tract of land in Minnesota, with a view to acquire a pre-emption right thereto, and did acquire such right. The tract consisted of the S. E. ¼ of the N. E. ¼ of sec. 13, and the N. W. ¼ of the S. W. ¼, and the S. ½ of the N. W. ¼, of sec. 18; that one George M. Van Brunt had assisted plaintiff in building a log house on the forty acres first mentioned, and had, as plaintiff's tenant, occupied the log house for a time, but the plaintiff had paid him for his work, and ejected him from the house, and the plaintiff has since been in possession of the house; that thereupon the said Van Brunt had built a house near by, and took up his

residence therein. This was before the land was surveyed by the United States. When the land was surveyed, it was found that both the houses above mentioned were on the same legal subdivision of forty acres, and Van Brunt filed his pre-emption claim in his lifetime to the whole 40 acres, and having died, his widow prosecuted the claim and obtained a patent therefor to the heirs of said Van Brunt. That this patent was obtained by fraud and collusion between the defendant, Flora E. Van Brunt and the Receiver of the Land Office, and by fraudulent contrivance of the Receiver personally at Washington, &c.

The bill further states, that the other defendants purchased parts of the land from a former guardian of the infant heirs of Van Brunt, and with notice of plaintiff's title; and that the defendant, Flora E. Van Brunt, now guardian of the infant heirs, is about to make further sales.

The bill further states, that the plaintiff has offered to refund to Flora E. Van Brunt the amount paid by her for the land, and requested a conveyance of it to him, which she has refused.

All of which said acts the bill charges are contrary to equity and good conscience and to the laws of the United States in regard to pre-emption rights.

The bill prays that the heirs be decreed to have taken the land as trustees for the plaintiff; that their guardian be decreed to convey to the plaintiff the unsold portions, and the purchasers of the sold portions be decreed also to convey to him; and that the guardian be enjoined from making the contemplated sale. Record, pp. 7 to 12.

The answer of Mrs. Van Brunt denies specifically every act of fraud, &c., charged, and makes this case: That her husband and the plaintiff jointly settled upon a tract of land containing 280 acres (*i. e.* seven tracts of forty acres each, quarters of quarter sections); that they jointly built and jointly occupied the log house; that in July, 1853,

they agreed to separate and to make partition of the land; that they agreed upon a division by a line running first north and then northwest, Van Brunt taking the west part and Warren the east part; that the line was so drawn as to give Warren the log house, deflecting for that purpose to the northwest. That Van Brunt sold to Warren his interest in the house, reserving the right to occupy it for a time, and never did occupy it as tenant. That Van Brunt made his claim to the whole forty acres, and it was contested by Warren; the Receiver and Register of the Land Office differed; the Commissioner of the General Land Office decided in favor of Mrs. Van Brunt; Warren appealed to the Secretary, who affirmed the Commissioner's diecsion. Rec., pp. 18 to 21.

The defendants, purchasers of parts of the land, answered to the same effect, and pleaded that they were purchasers for valuable consideration *bona fide* and without notice. Rec., pp. 13, to 17.

The plaintiff replied, denying the material parts of the answer, but praying that if the court should find against his right to the whole "forty," a decree should be made in his favor for so much thereof as fell to him, in the division set up by the defendant's answer. Rec. pp. 22, 23.

The Court specially found all the facts, substantially as set forth in the answer; negatived all fraud found, that as the forty acres, could not be divided or patented to more than one, the patent was rightly issued to Van Brunt's heirs, but decreed that they took it in trust for Warren as to so much of the law as was assigned to him in the division between him and Van Brunt, and decreed conveyance of so much, except the portions thereof that had been sold to two defendants, Culver and Farrington, who purchased without notice. Rec., p. 30.

Both parties appealed, and by the supreme court of the State judgment was reversed and the complaint dismissed.

The court rested its decision both on the construction

of the pre-emption laws and on the facts found by the court below, that both parties had submitted themselves to the decision of the officers of the United States, who had jurisdiction under the act of Congress to determine the question, and who, in the opinion of the court, made a fair adjustment of the controversy. "In so doing," said the court, "they allow Van Brunt's administratrix to enter the land where he and his family actually resided, and where he appears to have made improvements to a considerable amount, and they permit Warren to enter the land upon which his dwelling was situate, and where his family resided." See Opinion, Rec., p. 36.

The opinion of the supreme court of Minnesota, Rec., p, 34, shows clearly that under the pre-emption laws the land officers were compelled to decide between the conflicting claims of Van Brunt and Warren, and give the land to one or the other. Whether they decided rightly or not is, perhaps, wholly immaterial, as their action is not subject to review, but it would seem that Van Brunt had the strongest claim. First, he was entitled to at least three-fourths of the "forty" by the agreement between himself and Warren; and second, his house and all his farm buildings were on the "forty," whereas Warren had nothing there except a log house. And third, Warren did not reside on the forty or on the section (13) which contained the forty, but had removed therefrom and built his residence on the adjoiniug section, 18. The supreme court of Minnesota held that the terms of the pre-emption law permitting the settler to "enter his improvements *as near as may be* by legal subdivisions," necessarily gave a certain discretion to the land officers, and that in this case the discretion was properly exercised.

Jurisdiction.

We submit that this court has no jurisdiction of this case. No right or privilege was set up under the laws of

the United States; or, rather, although a title is claimed under an act of Congress, the obligation of the defendant to convey seems to be rested upon the general principles of equity applicable to the relations between the parties.

It is true that complainant alleges in his bill that he was entitled to the forty acres under the pre-emption laws of the United States, and the defendant had fraudulently obtained it, which would raise a federal question, but as the findings of the court negative this ground, and hold that the patent was properly issued to the Van Brunts, without any fraud or misconduct on the part of the defendants, or of the United States officers, it would seem that upon these facts this court has not jurisdiction.

In Downes vs. Scott, 4 Howard, 500, the plaintiff sued for the partition of a tract of land which had been patented to two persons as tenants in common. The defendant claimed that the land must be divided by an east and west or north and south line under an act of Congress. But this court, while expressing the opinion that the act of Congress did not apply to the case, said that the patent having properly issued, the partition of the land was to be made according to State laws, and that this court *had no jurisdiction of the case.*

In Lytle vs. Arkansas, 9 Howard, 314, 333, the Court said, speaking of the powers of the Register and Receiver under statutes then applicable: "From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the Commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final." And if final, the only federal question in the case stands already adjudicated.

Upon the Merits.

The patent was properly issued to the defendants.

The facts are, that at the time when, under the pre-

emption laws, the two settlers, Van Brunt and Warren, became entitled to pre-empt the land, to wit: when the survey was "made and returned," (act Aug. 4, 1854,) which was not till the spring of 1855, (Rec., p. 27, finding No. 10,) Warren resided and had his dwelling house on the forty acres next last of the disputed forty, and Van Brunt resided on the disputed forty, and had all his improvements thereon. Rec. p. 27, finding No. 8.

Warren and Van Brunt had settled on the disputed forty at the same time. Both had left it temporarily. Both had returned to it; but after having so returned, Warren had again left it, and established his residence on the adjoining forty, while Van Brunt had remained on it; and so when the time arrived to claim the pre-emption right, Van Brunt was found residing on the land in question and Warren not on it.

I.

It is contended by the plaintiff in error that he was entitled to the whole disputed forty because he was the first settler. But he did not make the first settlements; he only bought Van Brunt's interest in the first house erected on the land. But Van Brunt's occupation was not interrupted when he sold and left the log house; his cultivation continued, and he was off the forty only a few weeks while building a dwelling house on it. But Warren having fixed his residence on a forty in section 18, he acquired title to that tract and eighty acres more by pre-emption by reason of his residence thereon; and having acquired this, he sought to acquire also the whole of the disputed "forty," including Van Brunt's dwelling house and "a large corn crib, cow shed, and other outbuildings," with fences, ditches, and cultivated ground.

That he was not the first settler, the findings of the court show, but had he been, the act of September 4, 1841, which gave the right of pre-emption to the first settler, gave it in

cases where two persons had settled *on the same quarter section*, and such a provision could apply only to settlements on lands that had been surveyed, and not to unsurveyed lands, and so not to this case. But when the act was extended to the unsurveyed lands in Minnesota, it was provided that in case two persons should be found to have settled on the same quarter section, not that the first settler should have all, but that each should be permitted to enter his improvements as near as might be by legal subdivisions. Who was to *permit* the entry? Who was to judge what was "as near as may be?" Clearly the land officers with whom the entry was to be made, and, as by the very nature of the case the entry was a matter of judgment, to be subject to their sound discretion, that discretion was exclusive.

Mott v. Martin, 12 Wh., 45.
Gould vs. Hammond, 1 McAl., 235.
Wilkes vs. Dinsmore, 7 How'd, 89, 132.
Allen vs. Blunt, 3 Story, 742.
Otis vs. Watkin, 9 Cr., 355.

The decision contended for by the plaintiff would have been most unjust, as it would have given him not only his own improvements, but Van Brunt's also, and would have defeated the expressed purpose of the act by preventing Van Brunt from entering his improvements at all.

And again. The answer of Mrs. Van Brunt sets up that the line drawn by the agreement lay inside of the land pre-empted by Warren, and that consequently the Van Brunts were entitled under the agreement to some of that land which Warren had pre-empted. This allegation not being denied in the replication, stood admitted according to the *then* rules of pleading. And that it is true in point of fact appears from the finding of the court, that the diagonal part of the agreed line "commenced on the forty-acre tract, next east of the disputed line." This being so, Van Brunt, who was entitled to all the land south and

west of that line, must have been entitled to some land in the forty east of the disputed forty, and in the forty south of that. This the defendants have never claimed, as according to their view they are limited to legal subdivisions, but if a decree is to be made on the agreement, this should be considered.

The decision of the land officers led to but one practical difficulty, it left Warren's log house on Van Brunt's land. But this is a difficulty with which the laws of Minnesota are no doubt fully competent to deal. An obvious solution is the removal of the house on to Warren's land a distance by the plat of less than 150 yards.

II.

But it is said that if he was not entitled to the whole forty, it ought to have been patented to him and Van Brunt in common. The 8th section of the act of March 3, 1843, 5 Stat., 620, contemplates such a joint occupancy, but confines it to cases existing at the date of the act and arising under the acts of 1838 and 1840.

The provisions of the pre-emption act of September 4, 1841, seem to require the entry to be made by a single person, all its descriptions of the person entitled are in the singular number, and he is required to swear that the entry is for his own *exclusive* use. (Sec. 10, 13.) By the 4th section provision is made for the case of two persons settling on the same quarter section. It does not make them tenants in common but gives to one the exclusive right.

If however he had such a right it does not appear that he ever applied to be permitted to enter the land for himself and Van Brunt in common or produced before the Land Office any evidence that he was entitled so to enter it. If he had such right and did not claim it, it would seem on the authority of Downes vs. Scott, *supra*, that the right was lost. But if it was not lost no such right is

claimed in the bill or in any other way in the case, and consequently no decision has been made against it, and so this court has no jurisdiction of it.

It seems hardly necessary to say that no ground whatever exists for such a decree. Before the act of August, 1854, both parties were mere squatters, not authorized by the spirit or letter of any pre-emption laws to settle on unsurveyed lands, and when that act passed, it found them occupying distinct parts of the public lands and having nothing whatever in common. They were indeed both occupying parts, but distinct parts, of an indivisible tract of public land, but that did not make them tenants in common of each others' holdings.

III.

The 3d proposition is that if neither of the foregoing two modes of redress be found proper, then the court ought to have decreed a partition according to the terms of the agreement of July, 1853.

This is clearly not a federal question, as it relates only to the enforcement of a contract between two citizens of the same State, and its validity and construction and the measure of relief depends on State law.

In Minnesota, it seems such agreements have been held void, so far as they relate to the *land*.

St. Peter Co. vs. Bunker, 5 Minn. R., 192.
Folsom vs. Evans, 5 Minn. R., 422.
Bruggerman vs. Hoerr *et al.*, 7 Minn. R, 337.
McCue vs. Smith, 9 Minn. R., 252.

But in this controversy neither party relied on the agreement. In his bill, Warren made no mention of it, and when it was set forth in the answer, he did not amend his bill, and ask relief upon the agreement, but insisted on his case as made originally in his bill, claiming contrary to the agreement, and only prays *in his replication* that if he can

not have the relief he asks *against* the agreement, he may have relief *under* the agreement. Even if this had been made an amendment to the bill, it would be demurrable as setting up inconsistent titles to different measures of relief. Bernheimer vs. Marshall *et al.*, 2 Minn, 78; Fuller *et al.*, vs. Orthwein, 5 Minn., 377.

Nor does Mrs. Van Brunt rely on the agreement as a bar to Warren's claim. The purpose for which she intropuces it is only to explain the transaction which the plaintiff had narrated in a way to give color to his charge of fraud, viz.: that he had made the first settlement; that Van Brunthad *assisted* him in building; that he had paid Van Brunt for his services, and that Van Brunt was his tenant. So that, in fact, the agreement was regarded by both parties as having fulfilled its object, and having been fully performed by both.

But the agreement, even according to its terms, could not help Warren's case. It does not purport to convey or affect title the to the land. It concerned the possession only, and it had been fully executed by each party taking possession of what was assigned to him, and holding thereafter as if he had made the settlement entirely independently of the other, leaving their respective settlements to draw each after it its own legal consequences notwithstanding the agreement. Warren claimed before the department the whole forty by virtue of his first settlement. In his view the agreement had clearly performed its office and was at an end, and he was entitled as first settler on the forty, and occupant and sole owner of the first dwelling erected on it, to the whole forty, although Van Brunt had occupied and improved at least thirty acres of that "forty." And so also Mrs. Van Brunt claimed the whole forty. The agreement was treated by both as *functus officio*. It had produced a state of facts to which subsequent legislation of Congress attached certain consequences. It was a mere agreement as to what portions of the land

they should respectively "*use and possess.*" Neither was estopped to acquire title to himself from the United States, the absolute owner of the land.

As to the purchasers under Van Brunt.

It would be exceedingly unsatisfactory for a court to be compelled to affirm the decision of the court below against these defendants upon the single finding that, upon buying, they "had knowledge or information of the grounds of the plaintiff's claim to the land in controversy, and notice that the sale of said lots, or *any part of the disputed premises*, was objected to and forbidden by the plaintiff, and that he claimed title thereto adversely to all other parties." But there is enough in this finding to show the decree erroneous. The notice which these defendants had was of the claim to the whole forty, and of the grounds of that claim; those grounds we must suppose were the same which are set forth in the bill, and did not include the agreement of 1853, or any right supposed to be derived from it, but a right inconsistent with it.

The decree of the district court in this respect was clearly erroneous, and was properly reversed.

Conclusion.

We submit that the cause should be dismissed for want of jurisdiction; or if not, then that the decree of the supreme court of Minnesota should be affirmed.

J. M. CARLISLE,
J. D. McPHERSON,
For Defendant in Error.